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No. _____

In The

Supreme Court of the United States

October Term, 1991

CHRYSLER CORPORATION,

Petitioner,

v.

INTERNATIONAL UNION, ALLIED INDUSTRIAL WORKERS OF AMERICA, AFL-CIO; AND LOCAL 793 THEREOF,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner Chrysler Corporation discharged an employee after he sexually assaulted a co-worker by coming up behind her and grabbing her breasts. A labor arbitrator found that Chrysler lacked just cause to discharge the employee and ordered his reinstatement. The United States Court of Appeals for the Seventh Circuit enforced the arbitrator's award, holding that the reinstatement order did not violate public policy and that the court could not consider evidence of the employee's prior sexual assaults because it had not been considered by the arbitrator. The questions presented are:

1. Whether an arbitrator's award requiring an employer to reinstate an employee who had repeatedly sexually assaulted and harassed female co-workers violates public policy.

2. Whether evidence of an employee's history of sexually harassing co-workers that was not considered by an arbitrator in deciding that the employee's discharge violated a collective bargaining agreement can be considered by a federal court in determining whether the arbitrator's reinstatement order violates public policy.

3. Whether a court may refuse to enforce an arbitration award on public policy grounds only when the award itself violates the law or requires the employer to violate the law.

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On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

Chrysler Corporation petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.[1]

[1] A listing of petitioner's subsidiaries (other than wholly-owned subsidiaries) is set forth in the Appendix. App., *infra*, 65a. At the time this litigation was initiated, petitioner was known as Chrysler Motors Corporation.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-11a) is reported at 959 F.2d 685. The opinion of the district court (App., *infra*, 12a-43a) is reported at 748 F. Supp. 1352. The arbitrator's decision and award (App., *infra*, 44a-62a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 3, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185(a), provides in relevant part:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce * * * may be brought in any district court of the United States having jurisdiction of the parties * * * .

STATEMENT

Petitioner Chrysler Corporation fired Ronald K. Gallenbeck because he sexually assaulted a co-worker while she was performing her job. After respondent Union grieved Mr. Gallenbeck's discharge pursuant to its

collective bargaining agreement with Chrysler, an arbitrator determined that sexual assault – unlike stealing or striking a foreman – did not constitute just cause for immediate discharge and ordered Mr. Gallenbeck reinstated. In deciding that reinstatement was appropriate, the arbitrator declined to consider the established fact that Mr. Gallenbeck had sexually assaulted and harassed women co-workers on at least four other occasions. The arbitrator reasoned that because Chrysler had not known of these assaults when it fired Mr. Gallenbeck, they were irrelevant to the question of whether he should be reinstated. The court of appeals affirmed the district court's enforcement of the arbitration award, holding that Mr. Gallenbeck's reinstatement did not violate any public policy and that, in making its public policy inquiry, the court had to defer to the arbitrator's conclusion that Mr. Gallenbeck's other acts of sexual harassment were not relevant.

The Seventh Circuit's decision to enforce the arbitrator's award reinstating an employee who had engaged in workplace sexual harassment is flatly inconsistent with *Newsday, Inc.* v. *Long Island Typographical Union*, 915 F.2d 840 (2d Cir. 1990). In *Newsday*, the Second Circuit correctly held that the judicial enforcement of such an award is barred by the strong public policy against workplace sexual harassment. This Court should grant this petition to make clear that an arbitral order requiring an employer to reinstate an employee who has sexually assaulted co-workers violates public policy.

The Seventh Circuit's holding that other incidents in which Mr. Gallenbeck sexually harassed co-workers were properly excluded from the public policy inquiry because

the arbitrator had not considered them likewise warrants further review. This part of the court of appeals' decision contradicts the teaching of *W.R. Grace & Co.* v. *Rubber Workers*, 461 U.S. 757, 766 (1983), that the public policy issue is one for the court's independent determination. It also depends upon a serious misreading of *Paperworkers* v. *Misco, Inc.*, 484 U.S. 29 (1987), which requires that a court consider established facts in determining whether an arbitral award violates public policy even if those facts were not considered by the arbitrator.

In addition, the decisions of the courts below rested upon the finding that "[n]o statute or judicial opinion * * * makes it illegal to employ a person who has sexually assaulted or harassed a co-worker on one occasion." App., *infra*, 37a. The courts thus answered in the affirmative the question this Court left open in *Misco*: whether an arbitration award can be overturned only if it violates the law or requires the employer to violate the law. 484 U.S. at 45 n.12. The courts of appeals are in conflict over this important issue, and this Court should resolve that conflict.

1. *The Facts Of This Case.* On January 5, 1989, Ronald Gallenbeck was working as a Fork Lift Group Leader at a Wisconsin warehouse that formed part of Chrysler's Beaver Dam Marine and Industrial Products facility. App., *infra*, 46a-47a. He had been employed at Beaver Dam since October 1987. *Id.* at 46a. Roxanne Barstow was an employee of the Boyd/Hunter Employment Agency, which had an inspection contract with one of Chrysler's suppliers. *Ibid.* She was also working in the warehouse on that day. It is undisputed (*id.* at 1a n.1, 49a) that during a telephone conversation Mr. Gallenbeck put down the

telephone receiver and walked up behind Ms. Barstow as she was inspecting a door panel. *Id.* at 47a. Mr. Gallenbeck "reached under her extended arms, grabbed her breasts, and squeezed them," causing Ms. Barstow to scream. *Ibid.* He then returned to the telephone and stated into it, "Yup, they're real." *Ibid.*

Ms. Barstow contacted an attorney about this sexual assault and reported it to Boyd/Hunter's manager. Chrysler did not learn of the assault until January 9. A Chrysler supervisor and a union representative then promptly questioned Mr. Gallenbeck, who admitted to having grabbed Ms. Barstow's breasts. App., *infra*, 47a. Chrysler's Personnel Manager immediately suspended Mr. Gallenbeck, and discharged him the following day for violation of Rule 10 of the company's code of conduct, which prohibited immoral or indecent behavior. *Ibid.*; Chrysler Arb. Br. at 3. Mr. Gallenbeck's termination notice reflected that his sexual assault on Ms. Barstow had prompted his firing. App., *infra*, at 46a.

Chrysler's subsequent investigation revealed that Mr. Gallenbeck had engaged in a pattern of sexual harassment and sexual assault in the workplace. Three witnesses later testified regarding these other incidents at the arbitration hearing. Ms. Barstow testified that on several occasions other than the one that immediately led to Mr. Gallenbeck's discharge, "when she came out of the break room, [he would] grab her on the 'hinder' and pinch her 'hinder,' " and that "he'd done it to other girls" as well. App., *infra*, 48a. Steve Kaiser, the Boyd/Hunter group leader at the warehouse, testified that he saw Mr. Gallenbeck sneak up behind Sherry Fletcher and grab her breasts, and that Mr. Gallenbeck would constantly grab

the legs and buttocks of female employees. *Ibid.*; Chrysler Arb. Br. at 11. Susan Christian, Boyd/Hunter's branch manager, testified that she received complaints about Mr. Gallenbeck's "ass grabbing" from Roxanne Barstow and from Mary Shepard. App., *infra*, 48a; Chrysler Arb. Br. at 12.[2] Though denying that he had grabbed Sherry Fletcher's breasts, Mr. Gallenbeck conceded in his testimony that he had "ass grabbed" female co-workers four times during his employment with Chrysler. Chrysler Arb. Br. at 12.

2. *The Arbitration.* Pursuant to their collective bargaining agreement with Chrysler, Respondents International Union, Allied Industrial Workers of America, AFL-CIO, and its Local 793 (hereinafter referred to together as the "Union") filed a grievance protesting that Chrysler had discharged Mr. Gallenbeck without good cause. App., *infra*, 47a-48a. See *id.* at 46a (Section 9.01 of the collective bargaining agreement required "proper cause" for discharge). Chrysler denied the grievance. The matter then proceeded to arbitration in accord with the procedure set out in the collective bargaining agreement. Under the labor contract, the arbitrator had "authority only to decide questions as to the meaning and application of the terms of this Agreement" and the arbitrator's decision was "final and binding on all parties." *Id.* at 45a.

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[2] Of these sexual assaults, only the incident for which Mr. Gallenbeck was discharged had been reported to Chrysler. Ms. Fletcher died in an automobile accident shortly after the breast-grabbing incident testified to by Mr. Kaiser, and Ms. Christian stated that she had not passed on reports of harassment of Boyd/Hunter employees to Chrysler. Chrysler Arb. Br. at 12.

Arbitrator Jay Grenig found that Chrysler lacked proper cause to fire Mr. Gallenbeck. He reduced the discharge to a 30-day suspension and ordered Chrysler to reinstate Mr. Gallenbeck with backpay. App., *infra*, 62a. In doing so, he distinguished between "extremely serious offenses, such as stealing or striking a foreman," which "usually justify summary discharge without the necessity of prior warnings or attempts at corrective discipline," and "[l]ess serious infractions" – such as sexual harassment and sexual assault – which "call not for discharge for the first offense, but for some milder penalty aimed at correction." *Id.* at 51a.

In reaching his decision the arbitrator considered only the January 5, 1989 assault against Ms. Barstow. He refused to take into account the evidence that Mr. Gallenbeck had persistently sexually harassed female coworkers, on the ground that "[a] discharge decision must generally stand or fall on the evidence which the employer had in possession at the time it acted" (App., *infra*, 59a), and that Chrysler "did not consider evidence of any other incidents when it decided that discharge was the appropriate penalty in this case." *Id.* at 60a.

3. *The District Court's Decision.* Chrysler brought suit in the district court under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, to vacate the arbitrator's award on the ground that the order to reinstate Mr. Gallenbeck violated public policy; the Union counterclaimed seeking enforcement of the award. App., *infra*, 12a. Ruling on cross-motions for summary judgment, the court dismissed Chrysler's complaint and ordered the award enforced. *Id.* at 38a.

In holding that the arbitration order requiring Chrysler to reinstate Mr. Gallenbeck did not violate public policy, the district court refused to consider evidence of sexual harassment beyond the single incident for which Mr. Gallenbeck was discharged. The court explained that the labor contract "leaves evidentiary matters to the arbitrator" and that the court was thus bound to defer to the arbitrator's decision not to consider evidence discovered after the discharge. App., *infra*, 28a n.8. The court then held that there is a dominant and well-defined public policy against workplace sexual harassment that is clearly established in case law and statutes and that consequently satisfies the criteria set out in *W.R. Grace* and *Misco*. *Id.* at 29a. Nevertheless, the court held that the award must be enforced because although Mr. Gallenbeck's *conduct* violated the policy against sexual harassment, the arbitrator's *award* did not. The district court emphasized that there is "[n]o statute or judicial opinion * * * which makes it illegal to employ a person who has sexually assaulted or harassed a co-worker on one occasion" (*id.* at 37a), and so no public policy specifically barred Mr. Gallenbeck's reinstatement. *Id.* at 29a.

4. *The Court Of Appeals' Decision*. The Seventh Circuit affirmed, holding that the arbitration award reinstating Mr. Gallenbeck did not contravene the public policy against sexual harassment in the workplace, and that in deciding whether the reinstatement order violated public policy the district court properly disregarded the evidence of Mr. Gallenbeck's other acts of sexual assault and harassment. The court of appeals held that "it was within the purview of the collective bargaining agreement and public policy for the arbitrator to order [Mr. Gallenbeck's]

reinstatement." *Id.* at 8a. In addition, although the court of appeals paid lip service to the principle that "the question of public policy is wholly independent from the collective bargaining agreement and is ultimately one for the courts" (*id.* at 4a), it held that in deciding whether reinstatement violated public policy, the district court properly refused to take into account the evidence relating to Mr. Gallenbeck's other sexual assaults. The court stated that because "[t]he parties bargained for the evidentiary matters and factual findings to be made by an arbitrator, * * * a reviewing court cannot disregard those factual determinations or supplement them with its own." *Id.* at 8a n.4.[3]

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[3] While its appeal was pending, Chrysler rehired Mr. Gallenbeck and on the same day fired him again, citing his history of sexually harassing co-workers. Cf. *Misco*, 484 U.S. at 45. The Union moved in the district court to have Chrysler held in contempt for this action. The contempt proceedings were held in abeyance during the appeal. After the court of appeals entered judgment, the district court found the Union's contempt motion to be meritless, because "Chrysler did reinstate Ronald Gallenbeck in compliance with this court's order," and Mr. Gallenbeck's second discharge "was not addressed in the original arbitration award which this court reviewed." App., *infra*, 63a. See also *id.* at 64a (denying motion to reconsider denial of contempt motion).

Chrysler's rehiring and re-firing of Mr. Gallenbeck does not moot this case. Under the arbitrator's reinstatement order, Chrysler remains liable to pay Mr. Gallenbeck backpay for the entire period between his two firings (apart from the 30 days of the suspension awarded by the arbitrator). Cf. *Powell* v. *McCormack*, 395 U.S. 486, 499-500 (1969).

REASONS FOR GRANTING THE PETITION

The arbitration award at issue in this case requires Chrysler to reinstate an employee with a history of blatant and offensive sexual assault and harassment of women co-workers. The court of appeals' decision to enforce that reinstatement order is inconsistent with the public policy of this Nation to end workplace sexual harassment and to require employers to maintain workplaces free of such harassment. Beyond doubt, had Chrysler reinstated this employee on its own, and had he sexually assaulted and harassed other women, the company would be subject to legal action for tolerating sexual harassment and a sexually hostile work environment.

Chrysler will not tolerate workplace sexual harassment; the company does its utmost to prevent such behavior. By discharging employees like Mr. Gallenbeck who engage in sexual harassment, Chrysler unmistakably signals that there is no room in its workforce for those who engage in this sort of outrageous conduct. But by reinstating Mr. Gallenbeck and leaving intact the "law of the shop" that sexual assault upon a co-worker is not a serious offense – a lesser offense, for example, than stealing or striking a supervisor – the court of appeals sends the opposite signal to Chrysler employees, and prevents the company from doing its part to promote the public policy against sexual harassment.

Had this dispute arisen in the Second Circuit, it is clear that Chrysler's position would have prevailed; the federal courts there would have refused to enforce arbitrator Grenig's award reinstating Mr. Gallenbeck because

it violates the strong public policy against sexual harassment in the workplace. See *Newsday, Inc.* v. *Long Island Typographical Union*, 915 F.2d 840 (2d Cir. 1990). This Court's intervention is essential to settle this conflict between the Seventh and Second Circuits – and to ensure that the decision below does not have a serious detrimental impact on efforts to end sexual harassment in our society.

This Court should also review the Seventh Circuit's decision that it could not consider the established fact that Mr. Gallenbeck had engaged in a series of acts of sexual assault and harassment. The court of appeals deferred to the arbitrator's determination that Mr. Gallenbeck's history of sexual harassment was not relevant to the question whether he had been fired for just cause under the terms of the collective bargaining agreement because Chrysler had not known of the other assaults when it discharged him. The court thereby made the inquiry whether Mr. Gallenbeck's reinstatement violated public policy turn on an arbitral ruling keyed to the very different issue of whether one incident of sexual assault constituted proper cause for discharge under the labor contract. The court thus reached a decision based more upon the accident of when evidence was discovered than on rational inquiry into Mr. Gallenbeck's behavior and the consequences of his reinstatement.

This Court has made clear that the public policy inquiry is for the court, not the arbitrator, and that the court is to consider established facts relevant to its inquiry even if those facts were ignored by the arbitrator. The Seventh Circuit's holding that it would be improper to consider uncontested evidence of Mr. Gallenbeck's

other sexual assaults seriously undermines the entire public policy doctrine. The correct approach is that taken by courts in the Title VII context. Courts applying Title VII acknowledge that as a matter of public policy it is wholly inappropriate to ignore after-acquired evidence about an employee's conduct in determining whether the employee may be granted reinstatement or other relief in a suit challenging discharge.

Finally, the decisions of the courts below were based upon a determination that "[n]o statute or judicial opinion * * * makes it illegal to employ a person who has sexually assaulted or harassed a co-worker on one occasion." App., *infra*, 37a. In refusing to vacate the arbitrator's award on public policy grounds because it was not illegal and did not require Chrysler to act illegally, the courts below decided an issue expressly left open by this Court in *Misco*. 484 U.S. at 45 n.12. Other courts of appeals have vacated arbitration awards that were not illegal and that required no illegal conduct, and this Court should resolve this conflict.

I. THE SEVENTH CIRCUIT'S RULING IS CONTRARY TO THE PUBLIC POLICY AGAINST SEXUAL HARASSMENT IN THE WORKPLACE AND CONFLICTS WITH DECISIONS OF OTHER COURTS.

Collective-bargaining agreements generally provide that disputes about the interpretation and application of the agreement must be settled through a grievance procedure and through the submission of unsettled grievances to final and binding arbitration. It has been clear

since this Court's *Steelworkers Trilogy* that an arbitrator's decision settling such a grievance is to be accorded substantial deference by federal courts adjudicating a claim for violation of a labor contract under Section 301 of the Labor Management Relations Act (LMRA), 29 U.S.C. § 185. *Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564, 567-568 (1960); *Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582-585 (1960); *Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597-599 (1960). This deference reflects the LMRA's "decided preference" for "the speedy resolution of grievances by private mechanisms" and "without the intervention of government." *Paperworkers* v. *Misco, Inc.*, 484 U.S. 29, 37, 38 (1987). See also *AT&T Technologies* v. *Communications Workers*, 475 U.S. 643, 648, 650 (1986). Thus, a court determining in a Section 301 suit whether to enforce or set aside an arbitrator's decision and award may not reject the arbitrator's findings of fact "simply because it disagrees with them"; "reject an award on the ground that the arbitrator misread the contract"; or "disagree with [the arbitrator's] honest judgment" as to "remedies for contract violations that he finds." *Misco*, 484 U.S. at 38. Provided "the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision." *Ibid.*

Judicial deference to arbitral decisions nevertheless has its limits. The arbitrator's award must "draw its essence" from the collective bargaining agreement – it "may not ignore the plain language of the contract" (*Misco*, 484 U.S. at 38) – and it must not be the product of fraud by the parties, of the arbitrator's dishonesty (*ibid.*),

or of the arbitrator's "own brand of industrial justice." *Enterprise Wheel*, 363 U.S. at 597. In addition, it is now settled that a court may not enforce an arbitration award "that is contrary to public policy." *W.R. Grace & Co.* v. *Rubber Workers*, 461 U.S. 757, 766 (1983). This rule is simply an application of the common law doctrine that a court may not enforce private contracts that violate law or public policy. It "derives from the basic notion that no court will lend its aid to one who founds a cause of action upon an immoral or illegal act," as well as from a concern that "the public's interests in confining the scope of private agreements * * * will go unrepresented unless the judiciary takes account of those interests when it considers whether to enforce such agreements." *Misco*, 484 U.S. at 42. See, *e.g.*, *Hurd* v. *Hodge*, 334 U.S. 24, 35 (1948) ("Where the enforcement of private agreements would be violative of [the public policy of the United States], it is the obligation of courts to refrain from such exertions of judicial power").

This Court first articulated the rule against judicial enforcement of an arbitrator's interpretation of a labor contract that offends public policy in *W.R. Grace & Co.*, 461 U.S. at 766. *W.R. Grace* established that Federal courts may not enforce an arbitrator's contract interpretation if it violates "some explicit public policy" that is "well defined and dominant" and ascertainable " 'by reference to the laws and legal precedents,' " not merely " 'from general considerations of supposed public interests.' " *Ibid.* (quoting *Muschany* v. *United States*, 324 U.S. 49, 66 (1945)). See also *Hurd* v. *Hodge*, 334 U.S. at 34-35. It also settled that "the question of public policy is ultimately

one for resolution by the courts" and not by the arbitrator. 461 U.S. at 766.

This Court further considered the public policy doctrine in *Paperworkers* v. *Misco*. In that case the Court reversed a court of appeals decision overturning an arbitrator's award on public policy grounds. The Court reasoned that the public policy relied on by the court of appeals was not "properly framed under the approach set out in *W.R. Grace*" – that is, it had not been shown to derive from " 'laws and legal precedents' " and to be " 'well defined and dominant.' " 484 U.S. at 43-44. But the Court expressly reaffirmed the holding of *W.R. Grace* that a court may refuse to enforce an arbitration decision, even if it represents a correct interpretation of a collective bargaining agreement, if it violates public policy. *Id.* at 42-43. And it held that in making its public policy judgment, the court of appeals "quite properly considered" evidence that the arbitrator ignored because it was not known to the employer at the time it made its discharge decision. *Id.* at 44. The Court found it unnecessary to address the union's argument "that a court may refuse to enforce an award on public policy grounds only when the award itself violates a statute, regulation, or other manifestation of positive law, or compels conduct by the employer that would violate such a law." *Id.* at 45, n.12.

W.R. Grace and *Misco* are the only decisions of this Court addressing the public policy doctrine as it applies to the enforcement of labor arbitration awards, and they have proved insufficient guidance for the lower courts. Thus, one leading commentator has complained that although *W.R. Grace* and *Misco* "set the standard" for the

cases involving public policy that "have begun to dominate judicial challenges to arbitration awards," they failed to "provid[e] a complete, or even satisfactory, definitive application of that standard." Gould, *Judicial Review of Labor Arbitration Awards*, 64 Notre Dame L. Rev. 464, 478, 486 (1989). In consequence, "a host of issues" concerning the application of the doctrine remain unresolved by this Court, leaving "the terrain of judicial review * * * complicated and confused." *Id.* at 472, 478. See also, *e.g.*, *Stead Motors* v. *Automotive Machinists Lodge 1173*, 886 F.2d 1200, 1217 (9th Cir. 1989) (en banc) (plurality opinion) (applying same standard as Seventh Circuit in this case and noting conflict with Eleventh Circuit); *Exxon Shipping Co.* v. *Exxon Seamen's Union*, 1992 WL 70391, *12-13 (D.N.J. 1992) (to be reported at 788 F. Supp. 829) ("No clear standard has emerged regarding the authority courts have to vacate arbitration awards based on public policy grounds. * * * Judicial opinions have accordingly vacillated on the proper approach"). As we demonstrate below, the Seventh Circuit's decision in this case is a product of this confusion.

A. The Seventh Circuit's Decision Directly Conflicts With The Second Circuit's Holding In *Newsday, Inc.* v. *Long Island Typographical Union*.

Sexual harassment in the workplace is a widespread and continuing problem in this country. See, *e.g.*, H.R. Rep. No. 40, Part I, 102d Cong., 1st Sess. 66-68 (1991); H.R. Rep. No. 644, Part 2, 101st Cong., 2d Sess. 32-37 (1990); Merit Systems Protection Board (MSPB), *Sexual Harassment in the Federal Government: An Update* 20 (June

1988); MSPB, *Sexual Harassment in the Federal Workplace: Is it a Problem?* 59 (March 1981). There is no doubt – and the Seventh Circuit and district court held – that there is a well-defined, dominant and explicit public policy against such harassment. See App., *infra*, 4a ("The public policy against sexual harassment in the work place is well-recognized"). That public policy derives from laws and legal precedents and therefore satisfies the requirements set out in *W.R. Grace* and *Misco*. See *Newsday, Inc.* v. *Long Island Typographical Union*, 915 F.2d 840, 844-845 (2d Cir. 1990); *Communication Workers* v. *Southeastern Elec. Coop.*, 882 F.2d 467, 469 & n.5 (10th Cir. 1989); *Stroehmann Bakeries* v. *Local 776 IBT*, 762 F. Supp. 1187, 1188, 1189 (M.D. Pa. 1991).

Title VII of the Civil Rights Act of 1964 makes it unlawful for an employer to discriminate on the basis of sex. 42 U.S.C. § 2000e-2(a)(1). As this Court made clear in *Meritor Savings Bank* v. *Vinson*, 477 U.S. 57, 65-67 (1986), this prohibition extends to sexual harassment. Regulations promulgated by the Equal Employment Opportunity Commission (EEOC) define sexual harassment as "[u]nwelcome sexual advances * * * and other verbal or physical conduct of a sexual nature * * * when * * * such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." 29 C.F.R. § 1604.11(a) (1991). The EEOC has explained that

> unwelcome, intentional touching of [an employee's] intimate body areas is sufficiently offensive to alter the conditions of her working environment and constitute a violation of Title

> VII. More so than in the case of verbal advances or remarks, a single unwelcome physical advance can seriously poison the victim's working environment.

EEOC Policy Guidance: Sexual Harassment, N-915.035, reprinted in *EEOC Compliance Manual* (BNA) N:4001, 4016 (Oct. 25, 1988).

Moreover, Title VII places upon an employer the responsibility to maintain a work environment free of sexual harassment. Congress recently amended Title VII to allow the recovery of compensatory and punitive damages against employers. Civil Rights Act of 1991, Section 102, Pub. L. No. 102-166, 105 Stat. 1071, 1072-1074. A critical reason for that change in the law was to give employers a powerful incentive to act vigorously against sexual harassment. H.R. Rep. No. 40, Part I, 102d Cong., 1st Sess. 69-70 (1991). An employer "is responsible for acts of sexual harassment in the workplace [by co-workers] where the employer * * * knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action." 29 C.F.R. § 1604.11(d). See, *e.g.*, *Brooms* v. *Regal Tube Co.*, 881 F.2d 412, 421 (7th Cir. 1989). As a result, an employer's failure to respond immediately and appropriately to an employee's "single unwelcome physical advance" to a co-worker may result in the employer being held liable for a violation of Title VII and subjected to compensatory and punitive damages.

In direct conflict with the decision of the court of appeals in this case, the Second Circuit has held that an arbitral award reinstating an employee who engaged in sexual harassment violated the well-defined public policy

against workplace sexual harassment and could not be enforced. In *Newsday, Inc.* v. *Long Island Typographical Union*, 915 F.2d at 842, an employee " 'brushed up against [a female co-worker's] lower back and upper buttocks,' and then * * * 'slammed into her back' and 'said "Excuse me!" in a tone that made [the co-worker] feel the contact was not accidental.' " The employer's investigation of this incident revealed several other acts of similar sexual harassment and the employee was fired. *Id.* at 842-843. Although an arbitrator found that these incidents of sexual harassment were "serious, and of the type which Newsday has properly attempted to eliminate from its work place," he nevertheless determined that the employee's discharge had not been for "just cause" as required by the labor contract and ordered his reinstatement. *Id.* at 843.

The district court declined to enforce the arbitrator's award, holding that public policy against workplace sexual harassment "is subverted when an employer is required to reinstate an employee who is a chronic sexual harasser and an award which has that effect should be vacated." See 915 F.2d at 843. The Second Circuit affirmed. It held that the reinstatement award was contrary to public policy and could not be enforced because it "condones [the employee's] latest misconduct," "tends to perpetuate a hostile, intimidating and offensive work environment," and "[a]bove all," prevented the employer "from carrying out its legal duty to eliminate sexual harassment in the work place." *Id.* at 845.

The Seventh Circuit in this case was aware of the *Newsday* case (see App., *infra*, 4a, 7a) but made no effort to address the Second Circuit's public policy analysis. As

to the facts relevant to the courts of appeals' decisions, *Newsday* and this case are on all fours. The question for judicial determination in each case – does an arbitration order requiring reinstatement of an employee who has repeatedly engaged in workplace sexual harassment violate public policy? – was exactly the same, and the Second and Seventh Circuits answered that question differently. There can be no doubt that the Second Circuit would have decided this case differently (and that the Seventh Circuit would have decided *Newsday* differently).

This conflict is reflected in other decisions involving challenges to discharge for sexual harassment. In *Stroehmann Bakeries* v. *Local 776 IBT*, an arbitrator ordered reinstatement of a bakery employee who was alleged to have sexually assaulted a customer's clerk while making a delivery, holding that the employer had inadequately investigated the incident. Complaining that this award "sends a message to Stroehmann employees and to the public that complaints of sexual assault are not treated seriously, sensitively, or with real regard for the truth of the allegations" (762 F. Supp. at 1189), the district court vacated it as contrary to public policy against sexual harassment. Although the court remanded to a different arbitrator for consideration of the question whether the sexual assault had occurred, it made clear that if the evidence showed the employee had assaulted a customer, his reinstatement would violate public policy. *Id.* at 1190.

In contrast, the Tenth Circuit in *Communication Workers* v. *Southeastern Elec. Co-op.*, 882 F.2d 467 (1989), enforced an award reinstating an electric company lineman who had sexually assaulted a customer in her home. The court of appeals held that "[a]lbeit preventing the

sexual assault and abuse of women is of paramount importance," the arbitrator's "just cause determination fully incorporated this important concern under all of the circumstances." *Id.* at 469.

With the precedents in this state of disarray, it is impossible for employers to know what options are available to them in meeting their Title VII obligation to take immediate and appropriate action in response to incidents of sexual harassment. The stark division between the Second and Seventh Circuits creates burdensome uncertainties for national corporations like Chrysler; and those uncertainties threaten the effective pursuit of the Nation's shared goal of combatting workplace sexual harassment. This Court should grant certiorari in this case to resolve the conflict.

II. THE SEVENTH CIRCUIT'S HOLDING THAT IT COULD NOT CONSIDER THE ESTABLISHED FACT THAT MR. GALLENBECK SEXUALLY HARASSED CO-WORKERS ON OTHER OCCASIONS IS INCONSISTENT WITH THIS COURT'S PRECEDENTS.

In determining whether the arbitrator's reinstatement award should be vacated on public policy grounds, the district court and court of appeals held that they could not consider uncontested testimony at the arbitration hearing that Mr. Gallenbeck had sexually assaulted and harassed women co-workers on at least four other occasions during his employment with Chrysler. See App., *infra*, 48a; Chrysler Arb. Br. at 12. Arbitrator Grenig concluded that Mr. Gallenbeck's other acts of harassment were irrelevant to the issue whether his discharge had

been for just cause, because Chrysler learned of them only after the discharge. The Seventh Circuit held that because Chrysler and the Union had "bargained for the evidentiary matters and factual findings to be made by an arbitrator," the district court properly refused to consider the evidence of the other sexual assaults. App., *infra*, 8a n.4. In the court of appeals' view, it would have been improper for the district court to "supplement" the arbitrator's "factual determinations" with its own additional determinations. *Ibid.* The court of appeals erred; it confused the factual bases for the just cause and public policy inquiries and insulated the arbitrator's decision from public policy review to a much greater extent than is proper under this Court's decisions.

Chrysler and the Union agreed in their labor contract that an arbitrator's decision on a grievance would be the final and binding resolution of that contractual dispute. See App., *infra*, 45a. Chrysler acknowledges that, in consequence, arbitrator Grenig's disposition of procedural questions, his interpretation of the contract, and his determination of "historical facts" are binding on Chrysler and on the courts. See *Misco*, 484 U.S. at 39-40. For example, the district court in this case would not have been free to disagree with the arbitrator's finding that Mr. Gallenbeck sexually assaulted Ms. Barstow on January 5, 1989. There is a vast difference, however, between the proposition that an arbitrator's factual findings and inferences are binding on a court, and the holding below that a court conducting a public policy analysis must ignore established facts that the arbitrator ruled were not relevant to the inquiry whether there was just cause for discharge under the collective bargaining agreement.

It is clear under *W.R. Grace* and *Misco* that the just-cause-for-discharge and public policy inquiries are quite distinct. The former inquiry is about the meaning and application of a labor contract, and in this the arbitrator's interpretation of the contract is final and binding. The latter inquiry is about whether the arbitrator's order violates public policy and so may not be enforced by the court – not about whether the arbitrator's interpretation of the contract and award based on that interpretation are correct. That public policy issue "is ultimately one for resolution by the courts," not by the arbitrator, whose inquiry is much narrower in scope. *W.R. Grace*, 461 U.S. at 766; *Misco*, 484 U.S. at 43. This Court has never suggested that a court adjudicating a public policy challenge must operate within the straightjacket of an arbitrator's determination of the scope of facts relevant to the just cause issue.

On the contrary, a careful reading of *Misco* shows that this Court has squarely rejected the court of appeals' approach in this case. In *Misco*, law enforcement officers had discovered traces of drugs in an employee's car parked in his company's lot. The employer fired the worker on the basis of other (circumstantial) evidence of drug possession; it did not learn that drugs had been found in the employee's vehicle until after the discharge. An arbitrator ordered reinstatement of the employee on the ground that the company lacked just cause to fire him, refusing to consider evidence of possession acquired by the company after the firing.

Before it reached the public policy issue, this Court considered the employer's separate claim that the arbitral award should be vacated simply because "the arbitrator

committed grievous error in finding that the evidence was insufficient to prove" just cause for the discharge. 484 U.S. at 39. The Court held it had not been open to the lower court to question the arbitrator's refusal to consider evidence of employee misconduct that the employer learned only after the discharge. The controlling labor contract left evidentiary matters to the arbitrator, and the arbitrator's determination that this after-acquired evidence was not relevant to the question "whether there was just cause to discharge * * * was a construction of what the contract required when deciding discharge cases: an arbitrator was to look only at the evidence before the employer at the time of discharge." *Ibid.*[4]

Only then did the Court turn to the employer's argument that the reinstatement order violated public policy. The Court held that "[i]n pursuing its public policy inquiry, the Court of Appeals quite properly considered the established fact that traces of marijuana had been found in [the discharged employee's] car" – exactly the

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[4] The Seventh Circuit gave special emphasis to statements in *Misco* (484 U.S. at 38, 41) that an arbitrator's judgment in formulating remedies may not be questioned by a court. App., *infra*, 6a-7a. These passages appear in the part of the *Misco* opinion devoted to the issue whether a Court may refuse to enforce an arbitrator's award simply because it disagrees with the arbitrator's factfinding or interpretation of the collective-bargaining agreement. Of course, a court cannot vacate an arbitral award merely because it believes the arbitrator misapplied the labor contract or should have found different facts. That has nothing to do, however, with the question whether an arbitrator's order should be vacated because to enforce it would violate public policy.

evidence that the arbitrator had excluded from his consideration whether the discharge had been for just cause because the employer had not known it when it fired the employee. 484 U.S. at 44. The Court thus distinguished between taking into account evidence not considered by the arbitrator in deciding whether the arbitrator's decision was correct under the collective bargaining agreement – which it held a court could not do – and taking into account that same evidence in deciding whether the arbitrator's reinstatement order violated public policy. As to the latter issue, the Court held that it was "quite prope[r]" to consider the evidence that the arbitrator had not considered. *Ibid.*

The Seventh Circuit simply ignored that carefully drawn distinction in this case. It erroneously refused to consider the uncontested fact that Mr. Gallenbeck had engaged in sexual harassment on at least four other occasions. That fact was relevant to the court's public policy inquiry, and, as this Court explained in *Misco*, in deciding whether the arbitrator's reinstatement order violated public policy, it would have been "quite prope[r]" for the court of appeals to have considered Mr. Gallenbeck's history of sexual assaults and harassment.

The differing relevance of after-acquired evidence to a just cause inquiry and to other, legally distinct issues is well-understood in the context of Title VII and other anti-discrimination statutes. For example, in *Summers* v. *State Farm Mut. Ins. Co.*, 864 F.2d 700 (10th Cir. 1988), an employee alleged he had been fired because of his religion and age, in violation of Title VII and the Age Discrimination in Employment Act. The court of appeals

held that after-acquired evidence of the employee's misconduct was irrelevant to the question whether he had been fired for just cause, as the employer claimed. But it was of central importance to the question whether the employee was entitled to any relief; it showed he had suffered no legally cognizable injury – he would have been discharged had the employer known of the misconduct – and precluded the grant of any remedy. *Id.* at 708 ("To argue * * * that this after-acquired evidence should be ignored is utterly unrealistic"). Accord, *e.g.*, *Johnson* v. *Honeywell Information Systems, Inc.*, 955 F.2d 409, 412-413 (6th Cir. 1992). In the same way, the arbitrator's determination in this case that after-acquired but uncontested evidence of Mr. Gallenbeck's history of sexual harassment could not provide just cause for his discharge is in no way called into question by recognizing that such evidence is of great importance to the legally discrete inquiry whether a court may enforce the award reinstating Mr. Gallenbeck given the strong public policy against workplace sexual harassment.

Petitioner believes that *Misco*, carefully read, holds that a court must take account of established facts in conducting its public policy inquiry – even if those facts were not considered by the arbitrator. The lower courts, however, have not viewed *Misco* in that way; like the Seventh Circuit in this case, they have interpreted *Misco* to mean that a court determining if an arbitral award violates public policy may not go beyond the facts considered by the arbitrator as part of the just-cause-for-discharge inquiry. See *Interstate Brands Corp.* v. *Teamsters Local 135*, 909 F.2d 885, 894 (6th Cir. 1990); *Stead Motors* v. *Automotive Machinists Lodge 1173*, 886 F.2d 1200, 1207 (9th

Cir. 1989) (en banc); *United States Postal Service* v. *National Ass'n of Letter Carriers*, 839 F.2d 146, 149-150 (3d Cir. 1988). Because that interpretation incorrectly conflates the just cause and public policy inquiries and thereby seriously restricts the scope of public policy review, this Court should grant certiorari in this case to clarify its holding in *Misco* and to make clear that established facts of misconduct are relevant to a court's public policy analysis.

III. THIS COURT SHOULD DECIDE THE QUESTION IT EXPRESSLY LEFT OPEN IN *MISCO*: WHETHER A COURT MAY REFUSE TO ENFORCE AN AWARD ON PUBLIC POLICY GROUNDS ONLY WHEN THE AWARD ITSELF VIOLATES THE LAW OR REQUIRES THE EMPLOYER TO VIOLATE THE LAW.

The district court held that the arbitration award in this case had to be enforced because although Mr. Gallenbeck's conduct violated the public policy against sexual harassment, the award itself did not. The court reasoned that there is "[n]o statute or judicial opinion * * * which makes it illegal to employ a person who has sexually assaulted or harassed a co-worker on one occasion" and therefore no public policy barred Mr. Gallenbeck's reinstatement. App., *infra*, 37a. The court of appeals affirmed this reasoning. See *id.* at 4a, 6a-8a. See also *E.I. du Pont de Nemours* v. *Grasselli Emp. Ass'n*, 790 F.2d 611, 620 (7th Cir. 1986) (Easterbrook, J., concurring) ("[t]he question is whether the contract, as construed, violates positive law"); Easterbrook, *Arbitration, Contract, and Public Policy*,

in Arbitration 1991: The Changing Face of Arbitration in Theory and Practice 65 (G. Gruenberg ed. 1992).

The courts below thus decided in the affirmative the question expressly left open by this Court in *Misco*: Whether "a court may refuse to enforce an award on public policy grounds only when the award itself violates a statute, regulation, or other manifestation of positive law, or compels conduct by the employer that would violate such a law." 484 U.S. at 45 n.12. The District of Columbia Circuit follows the same approach. See *American Postal Workers Union* v. *United States Postal Service*, 789 F.2d 1, 8 (D.C. Cir. 1986).

Other courts of appeals look to whether, under all of the facts and circumstances, the arbitrator's order is contrary to public policy. See, *e.g.*, *Newsday, Inc.* v. *Long Island Typographical Union*, 915 F.2d 840, 844-845 (2d Cir. 1990); *Interstate Brands Corp.* v. *Teamsters Local 135*, 909 F.2d 885, 893 (6th Cir. 1990); *Delta Air Lines* v. *Air Line Pilots Ass'n*, 861 F.2d 665, 669-671 (11th Cir. 1988); *United States Postal Service* v. *National Ass'n of Letter Carriers*, 839 F.2d 146, 149-150 (3d Cir. 1988). These courts – unlike the Seventh and District of Columbia Circuits – do not require that reinstatement be flatly illegal, only that under the circumstances of the case it be contrary to public policy.

Chrysler does not claim that it would be illegal to reinstate Mr. Gallenbeck. Instead, it claims that it would violate the dominant public policy against sexual harassment – and the policy requiring employers to act decisively to prevent sexual harassment – to require the company to reinstate Mr. Gallenbeck. That is an argument that will fall on deaf ears in the Seventh and District of

Columbia Circuits, but will be given a fair hearing in the Second, Third, Sixth and Eleventh Circuits. This Court should grant certiorari to resolve this conflict and to make clear that the public policy inquiry under *W.R. Grace* and *Misco* is not so narrow as to make arbitration decisions that offend public policy effectively unreviewable.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JULY 1992

APPENDICES

APPENDIX A

CHRYSLER MOTORS CORPORATION,
Plaintiff-Appellant, Cross-Appellee,

v.

INTERNATIONAL UNION, ALLIED INDUSTRIAL WORKERS OF AMERICA, AFL-CIO, and LOCAL 793 thereof,
Defendants-Appellees, Cross-Appellants.

Nos. 90-1423, 90-1804.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Argued June 6, 1991.
Decided April 3, 1992.

Appeal from the United States District Court for the Eastern District of Wisconsin, No. 89 C 999 – Thomas J. Curran, Judge.

Before RIPPLE and KANNE, Circuit Judges, and NOLAND, Senior District Judge.*

KANNE, Circuit Judge.

Ronald Gallenbeck was discharged from his position as a fork lift operator by Chrysler Motors Corporation after he sexually assaulted a female co-worker.[1] Pursuant to Chrysler's collective bargaining agreement with the

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* The Honorable James E. Noland, Senior District Judge for the Southern District of Indiana, is sitting by designation.

[1] The facts are undisputed. During a telephone conversation, Gallenbeck put down the telephone receiver and approached the co-worker from behind and grabbed her breasts as she inspected a door panel nearby. He then returned to the telephone and stated, "Yup, they're real."

International Union, Allied Industrial Workers of America, AFL-CIO, and its union local (the Union), the Union filed a grievance protesting Gallenbeck's discharge. Chrysler denied the grievance and the matter proceeded to arbitration. The collective bargaining agreement provided that employees could be discharged for "just cause" and that the arbitrator had authority to decide questions as to the meaning and application of the agreement terms. Although Chrysler presented evidence that Gallenbeck had committed four other incidents in which he intentionally grabbed and/or pinched female coworkers, the arbitrator found that Chrysler acquired this information after the discharge and therefore the arbitrator refused to consider it. The arbitrator also found that the evidence upon which Gallenbeck's discharge was based did not indicate that he could not be rehabilitated. The arbitrator concluded that severe discipline short of discharge would be adequate to deter him from further misconduct and to demonstrate to all employees Chrysler's opposition to sexual harassment. The arbitrator determined that Gallenbeck was not discharged for "good cause" and reduced the penalty to a 30-day suspension, and directed Chrysler to reinstate Gallenbeck with back pay.

Both parties sought summary judgment in the district court. Chrysler asked to have the arbitration award set aside on the basis that the decision of the arbitrator is contrary to the public policy against sexual harassment in the work place. The Union sought dismissal of Chrysler's complaint and counterclaimed for prejudgment interest on the award of back pay and attorney's fees. The district court affirmed the arbitration award and ordered its

enforcement, but denied the Union's request for prejudgment interest and attorney's fees. The parties appeal and we affirm.[2]

Pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, a party moving for summary judgment must show that there is no genuine issue as to any material fact and that it is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552 (1986); *McGraw-Edison Co. v. Walt Disney Productions*, 787 F.2d 1163, 1167 (7th Cir. 1986).

It is well settled that judicial review of arbitration awards is extremely limited. *United Paperworkers International Union v. Misco, Inc.*, 484 U.S. 29, 36, 108 S. Ct. 364, 370 (1987); *E.I. DuPont de Nemours & Co. v. Grasselli Employees Independent Ass'n*, 790 F.2d 611, 614 (7th Cir.), *cert. denied*, 479 U.S. 853, 107 S. Ct. 186 (1986). "Unless the arbitral decision does not 'draw its essence from the collective bargaining agreement,' a court is bound to enforce the award and is not entitled to review the merits

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[2] After requesting an appeal, Chrysler rehired Gallenbeck and discharged him the same day on the basis of the incidents of sexual harassment not considered by the arbitrator. The Union asked to have Chrysler held in contempt for attempting to evade the district court's order enforcing the arbitrator's award, to which Chrysler had not sought a stay. We reversed the district court's finding that Chrysler's appeal to this court divested it of jurisdiction to hear the Union's motion because Chrysler appealed from an injunction, which was not a final order. *See* 28 U.S.C. § 1292(a)(1). Upon our suggestion, the district court deferred any contempt proceedings pending appeal and denied the Union's motion without prejudice. *See Chrysler Motors Corp. v. International Union, Allied Industrial Workers*, 909 F.2d 248 (7th Cir. 1990).

of the contract dispute." *W.R. Grace & Co. v. Local Union 759, International Union of United Rubber*, 461 U.S. 757, 764, 103 S. Ct. 2177, 2182 (1983) (citation omitted); *Misco*, 484 U.S. at 36, 108 S. Ct. at 370.

Chrysler argues that enforcement of the arbitration award directing reinstatement of an employee who sexually assaulted a co-worker violates public policy. While the merits of a grievance are for an arbitrator, the question of public policy is wholly independent from the collective bargaining agreement and is ultimately one for the courts. *Grace*, 461 U.S. at 766, 103 S. Ct. at 2183; *DuPont*, 790 F.2d at 615; *Amalgamated Meat Cutters & Butcher Workmen v. Jones Dairy Farm*, 680 F.2d 1142, 1144 (7th Cir. 1982). As with any contract, a court may not enforce an arbitrator's interpretation of a collective bargaining agreement that is contrary to public policy. *Grace*, 461 U.S. at 766, 103 S. Ct. at 2183; *Misco*, 484 U.S. at 42, 108 S. Ct. at 373. "Such a policy, however, must be well defined and dominant, and is to be ascertained 'by reference to the laws and legal precedents and not from general considerations of supposed public interests.' " *Grace*, 461 U.S. at 766, 103 S. Ct. at 2183 (citation omitted). The public policy doctrine allows this court to decide *de novo* whether the arbitrator's reinstatement of Gallenbeck violates public policy. *DuPont*, 790 F.2d at 617.

The public policy against sexual harassment in the work place is well-recognized. *See Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 65, 106 S. Ct. 2399, 2404 (1986); *Swanson v. Elmhurst Chrysler Plymouth, Inc.*, 882 F.2d 1235, 1238 (7th Cir. 1989), *cert. denied*, 493 U.S. 1036, 110 S. Ct. 758 (1990); *Newsday, Inc. v. Long Island Typographical Union, No. 915, CWA*, 915 F.2d 840, 844-45 (2d Cir. 1990),

cert. denied, ___ U.S. ___, 111 S. Ct. 1314 (1991). Title VII of the Civil Rights Act of 1964 prohibits employment discrimination on the basis of sex. 42 U.S.C. § 2000e-2. The Equal Employment Opportunity Commission (EEOC) promulgated guidelines which provide that verbal or physical conduct of a sexual nature constitute sexual harassment (a form of sex discrimination) when such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment. 29 C.F.R. § 1604.11(a) (1991). Employers must take all necessary steps to prevent sexual harassment in the work place, such as expressing strong disapproval of the conduct and developing appropriate sanctions. 29 C.F.R. § 1604.11(d), (f) (1991).

Chrysler contends that the arbitrator's interpretation of the collective bargaining agreement and his order reinstating Gallenbeck violate that public policy. Chrysler takes issue with the arbitrator's statements that:

> Under the principle of just cause[,] extremely serious offenses, such as stealing or striking a foreman[,] usually justify summary discharge without the necessity of prior warnings or attempts at corrective discipline. Less serious infractions call not for discharge for the first offense, but for some milder penalty aimed at correction.

Chrysler argues that the arbitrator created an inappropriate sex based "double standard" by finding that striking a supervisor (usually a man) is a serious offense warranting discharge whereas sexual harassment (in which the victim is usually a woman) is not such a serious offense.

Chrysler submits that this "double standard" becomes the "rule of the shop," in which employees with similar work records as Gallenbeck could expect to receive only minor penalties for sexual harassment and under which it would be impossible to forecast when such conduct would rise to the level of a dischargeable offense.

To support this argument, Chrysler cites *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S. Ct. 1775 (1989) as an articulation of the public policy against the utilization of double standards in employment decisions. *Price Waterhouse* involved the denial of a promotion on the basis of an employee's sex, which the Court found to be impermissible sex stereotyping, i.e., the application of a double standard based on gender. Chrysler's suggestion that the arbitrator created a similar "double standard" has no merit. The arbitrator began his decision by stating that where an employment contract provides that an employee may be disciplined or discharged for just cause, the degree of discipline imposed must reasonably relate to the seriousness of the employee's proven offense and the employment record of the employee. Therefore, the statements that Chrysler finds objectionable only indicate the arbitrator's belief that Gallenbeck's misconduct, as a first offense, was not serious enough to justify discharge without prior warnings or attempts at corrective discipline.

In the absence of any explicit provision, the arbitrator is free to bring " 'his informed judgment to bear in order to reach a fair solution of a problem. This is especially true when it comes to formulating remedies.' " *Misco*, 484 U.S. at 41, 108 S. Ct. at 372 (quoting *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597,

80 S. Ct. 1358, 1361 (1960)). "[W]here it is contemplated that the arbitrator will determine remedies for contract violations that he finds, courts have no authority to disagree with his honest judgment in that respect." *Id.*, 484 U.S. at 38, 108 S. Ct. at 371.

The arbitrator found it significant that Gallenbeck had not received warnings or discipline for any prior misconduct before being discharged. *See Newsday*, 915 F.2d 840; *Stead Motors of Walnut Creek v. Automotive Machinists Lodge No. 1173*, 886 F.2d 1200 (9th Cir. 1989) (*en banc*), *cert. denied*, 495 U.S. 946, 110 S. Ct. 2205 (1990); *Communication Workers of America v. Southeastern Electric Cooperative*, 882 F.2d 467 (10th Cir. 1989); *United States Postal Service v. National Ass'n of Letter Carriers*, 839 F.2d 146 (3rd Cir. 1988). The arbitrator also found that the evidence upon which Gallenbeck's discharge was based did not indicate that he could not be rehabilitated and that Chrysler had a system of progressive discipline. *See Stead*, 886 F.2d at 1213 ("[A] court would be hard-pressed to find a public policy barring reinstatement in a case in which an arbitrator, has, expressly or by implication, determined that the employee is subject to rehabilitation and therefore not likely to commit an act which violates the public policy in the future."); *DuPont*, 790 F.2d at 615-16 (refusing to second-guess arbitrator's reinstatement order given employer's failure to show that reinstatement would, in itself, violate public policy); *Communication Workers*, 882 F.2d 467 (reinstatement of employee who sexually assaulted a customer did not violate public policy where arbitrator found employee's

conduct was an aberration which could be remedied by punishment less severe than discharge).[3]

The arbitrator concluded that, under the circumstances, a 30-day suspension rather than discharge was an adequate sanction. While we do not condone Gallenbeck's behavior, it was within the purview of the collective bargaining agreement and public policy for the arbitrator to order his reinstatement. *See Misco*, 484 U.S. at 45, 108 S. Ct. at 374 (courts cannot upset award because of their own view that public policy is threatened); *Stead*, 886 F.2d at 1212. The district court properly enforced the arbitration award.[4]

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[3] As the district court noted, courts have refused to enforce arbitration awards ordering reinstatement where the discharged employees' conduct violated public policies while performing duties integral to their employment and where reinstatement would have jeopardized public health or safety. *See Delta Air Lines, Inc. v. Air Line Pilots Ass'n, International*, 861 F.2d 665 (11th Cir. 1988), *cert. denied*, 493 U.S. 871, 110 S. Ct. 201 (1989) (denied reinstatement to pilot who flew passenger plane while intoxicated); *Iowa Electric Light & Power Co. v. Local 204 of International Brotherhood of Electrical Workers*, 834 F.2d 1424 (8th Cir. 1987) (nuclear power plant machinist discharged for deliberately violating federally mandated safety regulation); *Amalgamated Meat Cutters & Butcher Workmen, Local Union 540 v. Great Western Food Co.*, 712 F.2d 122 (5th Cir. 1983) (vacated award ordering reinstatement of trucker caught drinking on duty). The district court found that Gallenbeck was not performing the integral duties of his position as a fork lift operator when he assaulted his co-worker.

[4] Chrysler contends that the district court erred in refusing to review the evidence of Gallenbeck's other incidents of sexual harassment which was not considered by the arbitrator.

(Continued on following page)

The Union cross-appeals the district court's denial of its request for prejudgment interest on the award of back pay and attorney's fees. The award of prejudgment interest in an action under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185, is within the discretion of the trial judge. *International Ass'n of Bridge, Local Union No. 103 v. Higdon Constr. Co., Inc.*, 739 F.2d 280, 283 (7th Cir. 1984). The district court found that the Union failed to state specific facts or law in support of an award of prejudgment interest. On appeal, the Union argues that the denial of prejudgment interest improperly rewards Chrysler for its noncompliance with the arbitration award and that such interest is necessary to make Gallenbeck whole. This reasoning is insufficient to support an award of prejudgment interest because it can be used any time an employer seeks review of an arbitration award ordering reinstatement but is unsuccessful. *See Oil, Chemical & Atomic Workers International Union v. American Cyanamid Co.*, 546 F.2d 1144 (5th Cir. 1977) (Union's allegation that prejudgment interest was necessary to make plaintiffs

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The parties bargained for the evidentiary matters and factual findings to be made by an arbitrator, and a reviewing court cannot disregard those factual determinations or supplement them with its own. *Stead*, 886 F.2d at 1207. The district court properly deferred to the arbitrator's conclusion that because Chrysler did not rely on the evidence in discharging Gallenbeck it was not relevant. *See Misco*, 484 U.S. at 39-40 n.8, 108 S. Ct. at 371 n.8 (approach consistent with practice followed by many arbitrators). In *Misco*, the Court rebuked courts for finding facts and drawing inferences, but noted that the Court of Appeals properly reviewed established evidence that was not considered by the arbitrator in its public policy inquiry.

whole was not sufficient to show district court abused its discretion in denying interest because reasoning would apply in any successful § 301 suit for damages under a collective bargaining agreement). The district court did not abuse its discretion in refusing to award prejudgment interest.

Although § 301 does not expressly authorize the award of attorney's fees, a prevailing party is entitled to such fees if the opponent's suit has no merit or is "frivolous," that is, brought in bad faith to harass rather than to win. *Local 879, Allied Industrial Workers v. Chrysler Marine Corp.*, 819 F.2d 786, 791 (7th Cir. 1987); *Miller Brewing Co. v. Brewery Workers Local Union No. 9*, 739 F.2d 1159, 1167 (7th Cir. 1984), *cert. denied*, 469 U.S. 1160, 105 S. Ct. 912 (1985). In light of the Supreme Court's acknowledgement in *Misco* that the Courts of Appeals are divided on the question of when courts may set aside arbitration awards as contravening public policy, 484 U.S. at 35, 108 S. Ct. at 369, and the district court's finding that this Circuit has not re-evaluated the public policy exception in a case involving employee misconduct since *Misco*, Chrysler's appeal of the arbitration award was not frivolous. *See Sheet Metal Workers Local Union No. 20 v. Baylor Heating and Air Conditioning, Inc.*, 688 F. Supp. 462, 474 (S.D. Ind. 1988), *aff'd*, 877 F.2d 547 (7th Cir. 1989) (attorney's fees should not be granted if law is unsettled). The district court properly denied the Union's request for attorney's fees.[5]

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[5] The Union also requests attorney's fees for this appeal pursuant to Rule 38 of the Federal Rules of Appellate

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The judgment of the district court is AFFIRMED.

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Procedure. Because Chrysler's appeal was not totally without merit, attorney's fees are denied. *See Mays v. Chicago Sun-Times*, 865 F.2d 134, 138-39 (7th Cir.) (awarding attorney's fees for frivolous appeal where appellant merely restated arguments that the district court properly rejected), *cert. denied*, 493 U.S. 900, 110 S. Ct. 259 (1989); *Dreis & Krump Mfg. Co. v. International Ass'n of Machinists & Aerospace Workers, Dist. No. 8*, 802 F.2d 247, 255 (7th Cir. 1986) (awarding attorney's fees on appeal where appellant failed to identify any arguable error in the district court's decision); *Indianapolis Colts v. Mayor & City Council*, 775 F.2d 177, 184 (7th Cir. 1985) (attorney's fees awarded for appeal that was "wholly without merit").

APPENDIX B

CHRYSLER MOTORS CORPORATION,
Plaintiff,

v.

INTERNATIONAL UNION, ALLIED INDUSTRIAL WORKERS OF AMERICA, AFL-CIO, and Local 793, Defendants.

No. 89-C-999

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

January 26, 1990

OPINION AND ORDER

CURRAN, District Judge.

Chrysler Motors Corporation (CMC) has commenced the above-captioned case against the International Union, Allied Industrial Workers of America, AFL-CIO, and Local 793 (the Unions) seeking an order vacating an arbitrator's award issued on July 24, 1989, because it is contrary to public policy. The defendant Unions have answered by denying that the award should be vacated and by asserting a counterclaim seeking enforcement of the award, prejudgment interest on all monies found owing to the grievant,[1] costs and attorney fees. The court

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[1] In their Counterclaim the Unions ask for "postjudgment" interest. They have attempted to change this to "prejudgment" interest in their brief. *See* Answer and Counterclaim at 6; Memorandum in Support of Defendants' Motion for Summary Judgment to Have Plaintiff's Complaint Dismissed and to Provide the Relief as Sought by Defendants in Its Counterclaim at 2 n. 2.

has jurisdiction[2] over the subject matter of the plaintiff's claims and the defendants' counterclaims in that this is a civil action arising under an Act of Congress regulating commerce. *See* 28 U.S.C. § 1337(a). The Act in this case is section 301(a) of the Labor Management Relations Act of 1947 which provides that:

> Suits for violations of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter . . . may be brought in

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[2] In general, an arbitrator's award must be final and binding before judicial review can be undertaken. *See Millmen Local 550, United Brotherhood of Carpenters and Joiners of America, AFL-CIO v. Wells Exterior Trim*, 828 F.2d 1373, 1375 (9th Cir. 1987). To be considered "final," an arbitration award must be intended by the arbitrator to be his complete determination of every issue submitted to him. *Anderson v. Norfolk and Western Railway Company*, 773 F.2d 880, 883 (7th Cir. 1985).

In this case the arbitrator concluded his award by stating that:

> In the event there is a dispute with respect to computation of the remedy, the Arbitrator retains jurisdiction for a period of 60 days from the date of this award to hear and determine that issue only.

Complaint at Exhibit B, p. 22. The Unions did not contest jurisdiction and apparently the computation issue was never submitted to the arbitrator. Therefore, the court will assume that the award was final and that it has jurisdiction to review the award. *See United Steelworkers v. Enterprise Wheel & Car Corporation*, 363 U.S. 593, 599, 80 S. Ct. 1358, 1362, 4 L. Ed. 2d 1424 (1960) (arbitration need not complete the mathematical computations of the award for the award to be final and reviewable).

> any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C. § 185(a).

Shortly after the plaintiff filed a reply asking that the counterclaim be dismissed, the parties filed cross motions for summary judgment which are now fully briefed and ready for decision. Each side maintains that no material facts are in dispute and that it is entitled to judgment as a matter of law. *See* Federal Rule of Civil Procedure 56.

I. FACTS

CMC is a corporation which, among other things, operates a marine and industrial products manufacturing facility in Beaver Dam, Wisconsin. The Unions are the exclusive collective bargaining representatives of certain CMC employees at the Beaver Dam facility, including Ronald Gallenbeck, the grievant in the underlying arbitration proceeding. The parties in this case have entered into a collective bargaining agreement which is effective from July 1, 1986, through June 30, 1991.

On October 27, 1987, while this agreement was in effect, CMC hired Gallenbeck as a fork lift operator. After a female employee at the Beaver Dam facility complained that Gallenbeck had sexually assaulted her, CMC suspended, then promptly fired, Gallenbeck on January 10, 1989, for what the company believed to be "proper cause" as provided in Article IX of the collective bargaining agreement. *See* Complaint at Exhibit A, Article IX. The Unions filed a grievance protesting the discharge and the

matter proceeded to arbitration on June 16, 1989. *See Id.* at Exhibit A at Article III, Section 3.02.[3] In his decision of July 24, 1989, the arbitrator, Jay E. Grenig, found that the following events occurred:

> The Grievant began work with the Employer at its Beaver Dam Marine and Industrial Products facility on October 27, 1987, as a Fork Lift Operator Trainee. He was discharged effective January 10, 1989. The notice of termination stated, in pertinent part, as follows:
>
> > On Monday, January 9, 1989, [B], a contract employee of Boyd-Hunter, Inc., assigned to the Chrysler Marine Corporation Warehouse, advised [the Production Control Manager] that she was sexually assaulted by [the Grievant], who approached [B] from behind, reached around her body and fondled her breasts.

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[3] The collective bargaining agreement provides that at Step 5 of the grievance procedure:

> The Corporation and the Union shall choose an arbitrator. However, should no agreement be reached in the selection of an arbitrator, the Corporation and the Union agree to request the Federal Mediation and Conciliation Service to provide an arbitrator. The decision of the arbitrator shall be final and binding on all parties. The arbitrator shall have authority only to decide questions as to the meaning and application of the terms of this Agreement, and such arbitrator shall have no authority to change existing rate ranges, incentive base rates or day work rates, for any labor grade or to add, delete or modify any of the terms of this Agreement.

Complaint at Exhibit A, Section 3.02.

> [B] also advised [C] of Boyd-Hunter, Inc., of the incident, stating she would file criminal charges if [Grievant] was not removed from the warehouse.

At the time of his discharge, the Grievant was a Group Leader working in a warehouse approximately six miles from the Beaver Dam facility. B was employed by Boyd/Hunter Employment Agency, which had an inspection contract with one of the Employer's suppliers. B also worked at the warehouse.

The Grievant was at work on January 5, 1989, when he received a telephone call. During the course of his telephone conversation, he put the telephone receiver on the desk and walked over to B, while B was inspecting door trim panels for defects. While she was inspecting a door panel, the Grievant came up behind her, reached under her extended arms, grabbed her breasts, and squeezed them. B screamed and the Grievant returned to the telephone, where he stated, "Yup, they're real."

B contacted an attorney regarding the incident that night. She reported the incident to the Boyd/Hunter's manager the next morning. When the Employer learned of the incident on Monday, January 9, the Grievant's supervisor and the Union president went to the warehouse. They spoke with the Grievant, who admitted to having grabbed B's breasts.

The supervisor informed the Personnel Manager of Grievant's admission and the Grievant was suspended from work. The situation was discussed with the Employer's legal staff in Detroit and the suspension was converted to a discharge effect [sic] January 10, 1989.

On January 12, 1989, the Grievant filed a grievance, stating, in pertinent part, as follows:

> The Aggrieved feels that retaliation has occurred stemming form [sic] the Alleged allegations. The Co. dismissal of the aggrieved was to [sic] severe. The Co. should fully consider the time of service and over all work performance of the aggrieved.

The grievance asked for the following remedy: "Full reinstatement with full backpay and all alleged allegations removed from his record."

The grievance was denied and the issue submitted for resolution in this arbitration proceeding.

B testified at the arbitration hearing that the Grievant had grabbed her before. She testified that when she came out of the break room, he'd grab her on the "hinder" and pinch her "hinder." She said that he'd "done it to other girls." B stated that she had reported the incidents to the manager at Boyd/Hunter.

The Boyd/Hunter group leader at the warehouse testified that there had been at least one other incident of the Grievant grabbing a female co-worker. He said that the co-worker never complained to his knowledge.

During the Grievant's employment with the Employer, he never received any discipline and he never missed a day of work. During this period he frequently worked six or seven days a week and ten-hour days.

> The Union president testified at the hearing that sometime in December 1988 B told him that she was going to do whatever she had to do to get rid of "that son of a bitch" – meaning the Grievant.
>
> Employer witnesses testified that the Grievant had engaged in conduct similar to that with which he is charged here in the past, although he had never been disciplined for the conduct.
>
> The Employer's Production Control Manager testified that the Employer utilizes a corrective or progressive disciplinary system.

Complaint at Exhibit B, pp. 3-6.

In the arbitration proceeding CMC took the position that Gallenbeck's conduct constituted sexual harassment or sexual assault and battery; that this conduct furnished proper cause for discharge; that discharge has been upheld as the proper remedy for such conduct in most other cases; and that there were no mitigating circumstances warranting reinstatement.

The Unions, on the other hand, characterized the conduct as "horseplay" and argued that "there is a distinction between someone who acts out of a misguided and no longer acceptable so-called sense of humor and someone who really seeks sexual gratification." *Id.* at Exhibit B, p. 7. Pointing out that the company had a progressive disciplinary policy and that the company knew of no other similar incidents when it fired Gallenbeck, the Unions asked that the discharge be reduced to a suspension.

After hearing these arguments, the arbitrator began his decision by observing that:

> Where the contract provides that an employee may be disciplined or discharged for just cause, proper cause, or good cause, the degree of disciple [sic] imposed must reasonably relate to the seriousness of the employee's proven offense and the record of the employee in his service with the Employer.

Id. at Exhibit B, pp. 8-9. The arbitrator reasoned that, while serious offenses such as stealing or striking a foreman usually justify summary discharge, less serious offenses call for a milder penalty. Based on these threshold considerations, the arbitrator framed the issue as follows: "There is no dispute with respect to whether the Grievant grabbed B's breasts. The only significant question is whether the penalty imposed by the Employer was appropriate under the circumstances." *Id.* at Exhibit B, pp. 11-12.

After reviewing numerous other arbitration decisions involving allegations of employee misconduct, the arbitrator pointed out that in most other cases where a discharge was upheld, the employee had been warned or previously disciplined for prior conduct. In contrast, CMC did not know of any other incidents of sexual assault by Gallenbeck before it fired him. Therefore, the arbitrator decided that the several incidents which came to light after Gallenbeck's discharge could not be considered in determining whether the discharge was for proper cause.

His review of other cases also persuaded the arbitrator that, while sexual harassment is a serious offense, it is not serious enough to justify discharge without prior

warnings or attempts at corrective discipline.[4] The arbitrator found that CMC had such a system of progressive discipline and that "the evidence does not indicate that the Grievant could not be rehabilitated and correct his behavior. Although not a long-term employee, the Grievant had a blemish free disciplinary record prior to his discharge and was considered to be a good employee." Complaint at Exhibit B, p. 20. Based on these findings, the arbitrator decided that: "Because the penalty here was too severe under all the circumstances, it is concluded that there was not good cause to discharge the Grievant. However, there was good cause to suspend the Grievant for 30 workdays." *Id.* at Exhibit B, p. 21. The arbitrator then fashioned the following award:

> Having considered all the relevant evidence and the arguments of the parties, it is concluded that the discharge of Ronald Gallenbeck on January 10, 1989, was not for good cause. However, there was good cause to suspend the Grievant for 30 workdays.
>
> Accordingly, the Employer is directed to reduce the Grievant's discharge to a 30-workday suspension and to reinstate and otherwise make the Grievant whole for all lost benefits except for that period constituting the 30-workday suspension. The backpay is to be reduced by the Grievant's earnings since his discharge.
>
> In the event there is a dispute with respect to computation of the remedy, the Arbitrator

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[4] The arbitrator makes the dubious assertion that: "This is not to say that sexual harassment cannot be tolerated in the workplace." Complaint at Exhibit B, p. 20.

> retains jurisdiction for a period of 60 days from the date of this award to hear and determine that issue only.

Id. at Exhibit B, pp. 21-22.

CMC now seeks to vacate this award on the ground that, as a matter of law, it contravenes public policy. The Unions seek to have the award enforced.

II. LEGAL STANDARDS FOR SUMMARY JUDGMENT

Under Federal Rule of Civil Procedure 56(c), a party moving for summary judgment must show that the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *See Celotex Corporation v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552, 91 L. Ed. 2d 265 (1986); *McGraw-Edison Company v. Walt Disney Productions*, 787 F.2d 1163, 1167 (7th Cir. 1986). When faced with a properly supported motion for summary judgment, the nonmovant may not avoid judgment by simply resting on its pleadings. If the nonmovant bears the burden of production on an issue at trial, it must affirmatively demonstrate, by specific showings, that there is a genuine issue of material fact requiring a trial. *See First National Bank of Cicero v. Lewco Securities Corporation*, 860 F.2d 1407, 1411 (7th Cir. 1988).

A "genuine" factual issue is one that properly can be resolved only by a finder of fact because it may reasonably be resolved in favor of either party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S. Ct. 2505, 2511,

91 L. Ed. 2d 202 (1986). A summary judgment procedure is not meant to be a trial on affidavits. "The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson*, 477 U.S. at 255, 106 S. Ct. at 2513. At the summary judgment stage the judge's function is to determine whether there is sufficient evidence favoring the nonmoving party for that party to be entitled to judgment. *See First National Bank of Arizona v. Cities Service Company*, 391 U.S. 253, 288-89, 88 S. Ct. 1575, 1592-93, 20 L. Ed. 2d 569 (1968). This inquiry implicates the substantive evidentiary standard of proof that would apply at a trial on the merits. Thus, in a civil case in which a bench trial has been requested, the record must show that the court could find by a preponderance of the evidence that the party upon whom the burden of proof is imposed is entitled to a judgment in its favor. *See Anderson*, 477 U.S. at 252, 106 S. Ct. at 2512. If that party's evidence is merely colorable, or is not significantly probative, summary judgment may be granted in favor of the opponent. *See Id.* at 249-50, 106 S. Ct. at 2510-11.

"As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Id.* at 248, 106 S. Ct. at 2510. Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at

trial." *Celotex Corporation v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552, 91 L. Ed. 2d 265 (1986).

Where, as here, the court is presented with cross motions for summary judgment, the court may fairly infer that no evidence other than the pleadings and supporting documents offered by the litigants need be considered in order to determine whether a genuine issue of material fact exists in the dispute. *See Williams v. Frank*, 702 F. Supp. 14, 16 (D. Mass. 1988). The court must consider each party's motion separately. Each movant has the burden of presenting evidence to support its motion which would allow the court, if appropriate, to enter judgment in its favor with the evidence being viewed in the light most favorable to the party opposing the motion. *See Barhold v. Rodriguez*, 863 F.2d 233, 236 (2d Cir. 1988).

III. DECISION

A. *The Arbitration Award*

Applying these standards to the case at hand, the court acknowledges at the outset that it must accept the arbitrator's factual findings and merit determinations and cannot supplement or correct them. *See Stead Motors of Walnut Creek v. Automotive Machinists Lodge No. 1173, International Association of Machinists and Aerospace Workers*, 886 F.2d 1200, 1207 (9th Cir. 1989) (*en banc*); *Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, Local Union 540*, 712 F.2d 122, 123 (5th Cir. 1983). Therefore, there are no material issues of fact which can be disputed. Instead, the movants are asking

the court to determine whether the arbitrator's award should be vacated or affirmed as a matter of law.

1. *Standard of Review*

The substantive law governing judicial review of an arbitrator's award is found in federal law developed pursuant to section 301(a) of the Labor Management Relations Act of 1947, 29 U.S.C. § 185(a), which governs disputes arising under collective bargaining agreements. *See Ludwig Honold Manufacturing Company v. Fletcher*, 405 F.2d 1123, 1127 & n. 22 (3d Cir. 1969). Under this law it is well-established that judicial scrutiny of an arbitrator's decision is extremely narrow. *See Local 879, Allied Industrial Workers of America, AFL-CIO v. Chrysler Marine Corporation*, 819 F.2d 786, 788 (7th Cir. 1987).

In 1960, the United States Supreme Court set forth the standards for review in the *Steelworkers Trilogy*.[5] First, the Court emphasized that parties who have agreed to binding arbitration must expect to abide by their bargain and may not consider arbitration as merely a preliminary step to *de novo* judicial review. *See Steelworkers of America v. American Manufacturing Company*, 363 U.S. 564, 568, 80 S. Ct. 1343, 1346, 4 L. Ed. 2d 1403 (1960). *See also Local 879, Allied Industrial Workers of America, AFL-CIO v. Chrysler*

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[5] The cases composing the *Steelworkers Trilogy* are: *United Steelworkers of America v. Enterprise Wheel & Car Corporation*, 363 U.S. 593, 80 S. Ct. 1358, 4 L. Ed. 2d 1424 (1960); *United Steelworkers of America v. Warrior & Gulf Navigation Company*, 363 U.S. 574, 80 S. Ct. 1347, 4 L. Ed. 2d 1409 (1960); *United Steelworkers of America v. American Manufacturing Company*, 363 U.S. 564, 80 S. Ct. 1343, 4 L. Ed. 2d 1403 (1960).

Marine Corporation, 819 F.2d at 788. Next, the Court explained that the collective bargaining agreement is "more than a contract" and that when a contract term is undefined, the arbitrator is the person designated to fill in the gaps with his expertise and knowledge of the "common law of the shop" and the "specialized needs" of the parties. *United Steelworkers of America v. Warrior & Gulf Navigation Company*, 363 U.S. 574, 578-82, 80 S. Ct. 1347, 1350-53, 4 L. Ed. 2d 1409 (1960). Finally, in *Enterprise Wheel*, the Court stated that, in general, "[t]he refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements." *United Steelworkers of America v. Enterprise Wheel & Car Corporation*, 363 U.S. 593, 596, 80 S. Ct. 1358, 1360, 4 L. Ed. 2d 1424 (1960). Consequently, an award may be overturned only if the arbitrator based his award on his own personal notions of right and wrong; if the arbitrator did not act within the confines of his jurisdiction; if the award does not draw its essence from the collective bargaining agreement; if the collective bargaining agreement is contrary to law; or if the contract, as interpreted by the arbitrator, would violate the law or any explicit, well-defined and dominant public policy. *See W.R. Grace & Company v. Local 759, International Union of United Rubber, Cork, Linoleum & Plastic Workers of America*, 461 U.S. 757, 766, 103 S. Ct. 2177, 2183, 76 L. Ed. 2d 298 (1983); *Enterprise Wheel & Car Corporation*, 363 U.S. at 597, 80 S. Ct. at 1361. If on its face the award represents a plausible interpretation of the contract, judicial inquiry ceases and the award must be enforced. This remains so even if the basis for the arbitrator's decision is ambiguous and notwithstanding the erroneousness of

any factual findings or legal conclusions. *See Enterprise Wheel & Car Corporation*, 363 U.S. at 597-99, 80 S. Ct. at 1361-62. *See also George Day Construction Company v. United Brotherhood of Carpenters and Joiners of America, Local 354*, 722 F.2d 1471, 1477 (9th Cir. 1984).

2. *Public Policy*

CMC is moving to vacate the arbitrator's award on the ground that it violates public policy. Although the Supreme Court has held that the public policy doctrine is applicable to labor arbitration cases, in *United Paperworkers International Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 108 S. Ct. 364, 98 L. Ed. 2d 286 (1987), it cautioned against the broad application of the doctrine to invalidate a labor arbitrator's award. *See Id.* at 43, 108 S. Ct. at 373. When an arbitration award is challenged on public policy grounds, the court must first determine whether the arbitrator's interpretation of the contract jeopardizes a well-defined and dominant public policy, taking the facts as found by the arbitrator.[6] *See Board of County*

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[6] The review given an arbitration award when it is challenged on public policy grounds is not de novo. When a court reviews an issue under a de novo standard of review, the court is determining questions of fact and law as though the reviewing court was the original trial court (or the arbitration panel). In contrast, when an arbitration award is challenged on public policy grounds, the court must determine whether the arbitrator's interpretation of the contract jeopardizes a well-defined and dominant public policy, taking the facts as found by the arbitrator. The arbitrator cannot consider public policy since public policy questions are for the court, not the arbitrator. An

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Commissioners of Lawrence County, Ohio v. L. Robert Kimball and Associates, 860 F.2d 683, 686 (6th Cir. 1988) (case brought under provisions of United States Arbitration Act); *Local Joint Executive Board of Las Vegas v. Riverboat Casino, Inc.*, 817 F.2d 524, 527 (9th Cir. 1987). The Supreme Court has explained that, for purposes of the narrow public policy exception to affirming a labor arbitrator's award, the policy at issue must be "well defined" and "dominant" and is to be ascertained "by reference to the laws and legal precedents and not from general considerations of supposed public interests." *W.R. Grace & Company v. Local Union 759, International Union of the United Rubber, Cork, Linoleum & Plastic Workers of America*, 461 U.S. 757, 766, 103 S. Ct. 2177, 2183, 76 L. Ed. 2d 298 (1983) (quoting *Muschany v. United States*, 324 U.S. 49, 66, 65 S. Ct. 442, 451, 89 L. Ed. 744 (1945)). Once the policy is identified, the party seeking to have the award vacated must show that a sufficient link exists between enforcement of the award and the violation of the policy to warrant the refusal to confirm the award. *See Misco*, 484 U.S. at 44, 108 S. Ct. at 374.

In this case the material facts, as found by the arbitrator in determining that Gallenbeck's conduct constituted "proper cause"[7] for discipline, are: that during working

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arbitrator who bases an award on public policy considerations exceeds his powers. *Board of County Commissioners of Lawrence County, Ohio v. L. Robert Kimball and Associates*, 860 F.2d 683, 686 (6th Cir. 1988).

[7] The parties' collective bargaining agreement provides that: "The Corporation has the right to hire, to increase and

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hours Gallenbeck had, on one occasion, sexually assaulted a female co-worker; that CMC discharged Gallenbeck after learning that he admitted committing the assault; and that, at the time of the discharge, CMC knew of only this one act of sexual assault or harassment perpetrated by Gallenbeck.[8] Prior to deciding that reinstatement after a thirty day suspension without pay would be

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decrease hours, to discipline or discharge for proper cause, to transfer employees from one job assignment to another and to lay off employees from duty because of lack of work, but the exercise of these rights shall not conflict with the provisions of the Agreement." Complaint at Exhibit A, Article IX, Section 9.01. The agreement also provides that seniority shall cease upon discharge for "good cause." *Id.* at Exhibit A, Article IV, Section 4.90. The agreement does not define "good" or "proper" cause, so the arbitrator is the one who must interpret these phrases. *See E.I. DuPont de Nemours v. Grasselli Employees Independent Association of East Chicago*, 790 F.2d 611, 619 (7th Cir. 1986), (Easterbrook, J., concurring), *cert. denied*, 479 U.S. 853, 107 S. Ct. 186, 93 L. Ed. 2d 120 (1986). He must fulfill his mandate by attempting to construe the general provisions of the contract so as to honor the parties' intentions in light of the tenets of industrial common law, that is, the industry practice or the shop rules.

[8] CMC invites the court to consider prior incidents in which Gallenbeck assaulted or harassed female co-workers. However, fortuitously for Gallenbeck, these incidents did not come to CMC's attention until after the discharge. The collective bargaining agreement leaves evidentiary matters to the arbitrator. Therefore, Arbitrator Grenig was free to rule that he would not consider after-discovered evidence not relied upon by the employer in ordering the discharge. Consequently, the court cannot consider these prior incidents in deciding whether the award violates public policy. *See United Paperworkers International Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 34 & n. 6 & 39-40, 108 S. Ct. 364, 368 & n.6 & 371-72, 98 L. Ed. 2d 286 (1987).

the appropriate remedy, the arbitrator found: that Gallenbeck had worked for CMC for approximately fourteen months prior to his discharge; that he had no disciplinary record and had received no warnings concerning his conduct; that he could be rehabilitated; and that CMC had a progressive disciplinary policy.

CMC maintains that Arbitrator Grenig's award violates "the dominant and well defined public policy of the United States against sexual harassment in the workplace." Plaintiff Chrysler Motors Corporation's Brief in Support of Its Cross-Motion for Summary Judgment and Response to Opposition to Defendant Union's Motion for Summary Judgment at 1. This policy identified by the plaintiff meets the Supreme Court's criteria because it is well-established in case law and statutory law that employees may not commit and employers may not tolerate sexual assault or sexual harassment in the workplace. *See, e.g.*, 42 U.S.C. § 2000e-2(a)(1); Wis. Stat. 111.36(1)(b); 29 C.F.R. § 1604.11(a); *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 73, 106 S. Ct. 2399, 2408, 91 L. Ed. 2d 49 (1986); *Brooms v. Regal Tube Company*, 881 F.2d 412, 418 (7th Cir. 1989); *Swanson v. Elmhurst Chrysler Plymouth*, 882 F.2d 1235, 1237 (7th Cir. 1989), *cert. denied*, ___ U.S. ___, 110 S. Ct. 758, 107 L. Ed. 2d 774 (1990).

The facts found by the arbitrator show that Gallenbeck's conduct violated this policy. However, the Ninth Circuit has recently pointed out that: "If a court relies on public policy to vacate an arbitral award reinstating an employee, it must be a policy that bars *reinstatement*." *Stead Motors of Walnut Creek v. Automotive Machinists Lodge No. 1173, International Association of Machinists and Aerospace Workers*, 886 F.2d 1200, 1212 (9th Cir. 1989) (*en*

banc) (footnotes omitted; emphasis in original). A plurality of the Ninth Circuit explained that:

> Courts cannot merely determine that there is a "public policy" against a particular sort of behavior in society generally and, irrespective of the findings of the arbitrator, conclude that reinstatement of an individual who engaged in that sort of conduct in the past would violate that policy. In our view, a faithful reading of *Misco* requires something more. A court must both delineate an overriding public policy rooted in something more than "general considerations of supposed public interests," and, of equal significance, it must demonstrate that the policy is one that specifically militates against the relief ordered by the arbitrator.

Id. at 1212-1213 (footnote omitted). The rationale for this approach is that:

> If the performance of an illegal act while on the job is all that must be proved to demonstrate the violation of a public policy for purposes of *Grace* and *Misco*, then an arbitrator would be *prohibited* from reinstating any teamster who receives a speeding ticket while driving the company truck, or even an inventory clerk who commits a single act of petty theft. *Grace* and *Misco* do not countenance such results.

Id. at 1215-16 (footnotes omitted).

The collective bargaining agreement under consideration here vests discretion to fashion a remedy in the arbitrator. While the agreement provides that the company may discharge an employee for "proper cause," "proper cause" is not defined and there is no list of

offenses requiring discharge. *Cf. Delta Queen Steamboat Company v. District 2 Marine Engineers and Beneficial Association, Associated Maritime Officers AFL-CIO*, 889 F.2d 599 (5th Cir. 1989) (reinstatement award vacated because arbitrator found riverboat captain "grossly careless" in navigating his ship and contract expressly provided that employee "shall be" discharged for "carelessness"). No explicit contractual provision prohibited CMC from discharging Gallenbeck, but normally, "an arbitrator is authorized to disagree with the sanction imposed for employee misconduct." *United Paperworkers International Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 41, 108 S. Ct. 364, 372, 98 L. Ed. 2d 286 (1987). In the absence of any explicit provision the arbitrator is free to bring " 'his informed judgment to bear in order to reach a fair solution of a problem. *This is especially true when it comes to formulating remedies.*' " *Misco*, 484 U.S. at 41, 108 S. Ct. at 372 (emphasis in original) (quoting *United Steelworkers of America v. Enterprise Wheel & Car Corporation*, 363 U.S. 593, 597, 80 S. Ct. 1358, 4 L. Ed. 2d 1424 (1960)).

In the wake of the Supreme Court's *Misco* decision narrowing the public policy exception, most courts have refused to vacate an arbitrator's award of reinstatement on public policy grounds – particularly when the arbitrator has found that the employee received no prior warnings or discipline; or that the employee could be rehabilitated; or that the employer had a progressive discipline policy. *See, e.g., Stead Motors of Walnut Creek v. Automotive Machinists Lodge No. 1173, International Association of Machinists and Aerospace Workers*, 886 F.2d 1200 (9th Cir. 1989) (*en banc*) (ordering reinstatement of auto mechanic who failed to tighten lug nuts on automobile

being sold by employer when arbitrator found employee subject to rehabilitation and unlikely to commit act which violates public policy in the future); *Communication Workers of America v. Southeastern Electric Cooperative of Durant, Oklahoma*, 882 F.2d 467 (10th Cir. 1989) (ordering reinstatement of electric company lineman accused of sexual assault on customer when this was lineman's first disciplinary problem in nineteen years with the employer); *United States Postal Service v. National Association of Letter Carriers, A.F.L.-C.I.O.*, 839 F.2d 146 (3d Cir. 1988) (ordering reinstatement of postal employee who fired gunshots at his superior's empty car when employee found to be amenable to discipline); *Maggio v. Local 1199*, 702 F. Supp. 989 (E.D.N.Y.) (ordering reinstatement of nurse's aide suspected of abusing nursing home patients when reinstatement would not violate any public policy), *aff'd*, 880 F.2d 1319 (2d Cir.) (mem.), *cert. denied*, ___ U.S. ___, 110 S. Ct. 329, 107 L. Ed. 2d 319 (1989); *Flushing Hospital and Medical Center v. Local 1199, Drug, Hospital and Health Care Employees Union RWSDU/AFL-CIO*, 685 F. Supp. 55 (S.D.N.Y. 1988) (ordering reinstatement of nursing attendant who changed a patient's IV bag without being qualified to do so when arbitrator found attendant was not likely to continue her wrongful conduct); *Brigham & Women's Hospital v. Massachusetts Nurses Association*, 684 F. Supp. 1120 (D. Mass. 1988) (ordering reinstatement of registered nurse who had negligently failed, in a few instances, to follow set procedures when nurse had an excellent work record with only five disciplinary incidents during seven years of service and employer had progressive discipline policy).

See also Daniel Construction Company v. Local 257, International Brotherhood of Electrical Workers, AFL-CIO, 856 F.2d 1174 (8th Cir. 1988) (ordering back pay for employees of nuclear power plant who had been discharged for failing psychological test later found to be invalid), *cert. denied*, 489 U.S. 1020, 109 S. Ct. 1140, 103 L. Ed. 2d 200 (1989).

In the two years since *Misco* only two circuits – the Eleventh and the Eighth – have ordered arbitrators' awards to be vacated on policy grounds and these decisions were in cases where employees violated public policies while performing duties integral to their employment and where reinstatement would have jeopardized public health or safety. *See Delta Air Lines, Inc. v. Air Line Pilots Association, International*, 861 F.2d 665 (11th Cir. 1988) (affirming district court order vacating award ordering reinstatement of pilot who had been discharged after he had flown passenger plane while intoxicated), *cert. denied*, ___ U.S. ___, 110 S. Ct. 201, 107 L. Ed. 2d 154 (1989); *Iowa Electric Light and Power Company v. Local Union 204 of the International Brotherhood of Electrical Workers (AFL-CIO)*, 834 F.2d 1424 (8th Cir. 1987) (affirming district court order vacating award ordering reinstatement of nuclear power plant machinist who had been discharged for deliberately violating federally mandated safety regulation). *See also Russell Memorial Hospital Association v. United Steelworkers of America*, 720 F. Supp. 583 (E.D. Mich. 1989) (vacating award ordering reinstatement of nurse who had been discharged for negligence in administering medication; however, it should be noted, that the Michigan district court relied in part on the Ninth Circuit's panel decision in *Stead Motors* which was

vacated by the full court shortly before the *Russell Memorial* opinion was issued, *see Stead Motors of Walnut Creek v. Automotive Machinists Lodge No. 1173, International Association of Machinists and Aerospace Workers*, 843 F.2d 357 (9th Cir. 1988), *withdrawn and rev'd*, 886 F.2d 1200 (9th Cir. 1989) (*en banc*).

Arbitrator Grenig's reinstatement award fits within the parameters of both lines of post-*Misco* decisions. Grenig concluded that discharge was too severe and ordered reinstatement only after finding that, although Gallenbeck had only been a CMC employee for fourteen months, he had no prior record of discipline or warnings and that, at the time of the discharge, CMC had no knowledge of his prior misconduct. Grenig also found that "the evidence does not indicate that the Grievant could not be rehabilitated and correct his behavior,"[9] and

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[9] Although the arbitrator speaks of the probability of rehabilitation in Gallenbeck's case, he does not explain how this can be accomplished by a thirty day suspension. *Cf. United States Postal Service v. National Association of Letter Carriers, AFL-CIO*, 810 F.2d 1239 (D.C. Cir. 1987) (reinstatement ordered for postal employee who pled guilty to unlawful delay of the mail after employee demonstrated that he had attended Gambler's Anonymous), *petition for cert. dismissed*, 485 U.S. 680, 108 S. Ct. 1589, 99 L. Ed. 2d 770 (1988). Nevertheless, as the *Stead Motors* court explained:

> [A]n arbitral judgment of an employee's "amenability to discipline" is a factual determination which cannot be questioned or rejected by a reviewing court. Judgments about how a specific employee will perform after reinstatement if given a lesser sanction are nothing more than an exercise of the

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that CMC has a policy of progressive discipline. Under similar circumstances the *Stead Motors* court stated that: "[I]t is only if the grievant is likely to engage in wrongful conduct which violates public policy in the future that his reinstatement could be said to violate public policy." *Stead Motors of Walnut Creek*, 886 F.2d at 1217.

Gallenbeck's is not one of the "hard cases" like the ones in which the Eleventh and Eighth Circuits vacated reinstatement awards because the lives of many people could have been directly placed at risk by the actions of the employees in question. When Gallenbeck assaulted his co-worker he was not performing an act integral to his job as a fork lift operator.[10] *See Delta Airlines, Inc. v.*

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> arbitrator's broad authority to determine appropriate punishments and remedies. This rule is supported by the significant societal interest in the rehabilitation of workers who err in the workplace. All of us benefit from employees who perform their jobs safely and properly. All of us suffer when potentially productive workers are relegated to the unemployment lines.

Stead Motors of Walnut Creek, 886 F.2d at 1213 (citations omitted).

[10] In vacating an arbitral award on public policy grounds, the Eleventh Circuit observed that:

> The public policy of which the Supreme Court speaks in *Misco* seems to be a public policy not addressing the disfavored conduct, in the abstract, but disfavored conduct which is *integral to the performance of employment duties.* The question we are instructed by *Misco* to ask is not, "Is there a public

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Air Line Pilots Association, International, 861 F.2d 665 (11th Cir. 1988), *cert. denied*, ___ U.S. ___, 110 S. Ct. 201, 107 L. Ed. 2d 154 (1989); *Iowa Electric Light and Power Company v. Local Union 204 of the International Brotherhood of Electrical Workers (AFL-CIO)*, 834 F.2d 1424 (8th Cir. 1987).

Arbitrator Grenig did not approve of Gallenbeck's behavior. He merely concluded that, under the circumstances, a thirty day suspension without pay was an adequate sanction. Even if the court agreed with CMC that a more severe sanction was appropriate, the court is not permitted to review the merits of the arbitral award.

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> policy against the employee's conduct?" but rather, "Does an established public policy condemn the performance of employment activities in the manner engaged in by the employee?"

Delta Air Lines, Inc. v. Air Line Pilots Association, International, 861 F.2d 665, 671 (11th Cir. 1988), *cert. denied*, ___ U.S. ___, 110 S. Ct. 201, 107 L. Ed. 2d 154 (1989). The court went on to explain that:

> When public policy is offended by what a person does, unrelated to the performance of his employment duties, an employer may well conclude that he should discharge that person as an expression of disapproval, though there be no public policy one way or the other. Where the person performs his employment duties and, *in doing so*, violates standards, restraints and restrictions on conduct, clearly and explicitly established by the people in their laws, a requirement that the employer suffer that malperformance and not discharge the offender does itself violate the same well established public policy.

Id. at 674.

See United Steelworkers of America v. Enterprise Wheel & Car Corporation, 363 U.S. 593, 596, 80 S. Ct. 1358, 1360, 4 L. Ed. 2d 1424 (1960).

Given the arbitrator's findings, CMC has failed to meet its burden of identifying the existence of a well defined, dominant and explicit public policy sufficiently grounded in federal or state laws and legal precedents with which the award conflicts. No statute or judicial opinion has been cited which makes it illegal to employ a person who has sexually assaulted or harassed a co-worker on one occasion.[11] The Seventh Circuit has ruled that "an employer is liable for an employee's acts if the employer knew or should have known about an employee's acts of harassment and fails to take appropriate remedial action." *Brooms v. Regal Tube Company*, 881 F.2d 412, 421 (7th Cir. 1989). However, the employer need not fire the offending employee in all instances. The court of appeals only requires that: "An employer's response to alleged instances of employee harassment must be reasonably calculated to prevent further harassment under the particular facts and circumstances of the case at the time the allegations are made." *Id.* (employer failed to take reasonable remedial steps in case where it knew employee had sexually harassed fellow employee and employer merely postponed merit increase and issued verbal reprimand).

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[11] Even if Gallenbeck had been arrested or convicted for sexual assault, Wisconsin law would forbid discriminating against him unless the circumstances of his offense were found to relate substantially to the circumstances of his particular job. *See* Wis. Stat. § 111.335.

Consequently, the court must decline CMC's request to vacate Arbitrator Grenig's reinstatement award on the ground that enforcement would violate public policy. The award will be confirmed; CMC's motion for summary judgment will be denied; and the Unions' motion for summary judgment will be granted.

B. *Prejudgment Interest*

In their counterclaim the Unions ask that "interest be granted on all moneys found owing to the Grievant, such interest to commence from July 24, 1989, the date of the issuance of the Award." Answer and Counterclaim at 6. The defendants have marshalled no specific facts or propositions of law in support of an award of prejudgment interest. They merely point out that all the circumstances of the case warrant such an award and that the plaintiff has not opposed it. *See* Defendants' Reply Brief in Support of Its [sic] Motion for Summary Judgment and in Opposition to Plaintiff's Cross-Motion for Summary Judgment at 6; Memorandum in Support of Defendants' Motion for Summary Judgment to Have Plaintiff's Complaint Dismissed and to Provide the Relief as Sought by Defendants in Its [sic] Counterclaim at 10. Awarding prejudgment interest in a section 301 action is within the discretion of the court. *See International Association of Bridge, Structural & Ornamental Ironworkers, Local Union No. 103, AFL-CIO v. Higdon Construction Company, Inc.*, 739 F.2d 280, 283 (7th Cir. 1984). In this case the defendants have not provided the court with a specific basis for awarding prejudgment interest. Therefore, the request for prejudgment interest on the award of backpay will be denied.

C. *Attorney Fees*

The Unions are also requesting attorney fees. Under the American Rule, absent contractual or statutory authorization, a prevailing litigant ordinarily may not collect attorney fees from the losing side. *See Summit Valley Industries, Inc. v. Local 112, United Brotherhood of Carpenters & Joiners of America*, 456 U.S. 717, 721, 102 S. Ct. 2112, 2114, 72 L. Ed. 2d 511 (1982). However, a court may assess attorney fees when the losing party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons. *Alyeska Pipeline Service Company v. Wilderness Society*, 421 U.S. 240, 258-59, 95 S. Ct. 1612, 1622, 44 L. Ed. 2d 141 (1975).

Section 301 of the Labor Management Relations Act does not provide for the shifting of costs and fees in suits for enforcement of arbitration awards. Consequently, any award of fees is discretionary. *See Fabricut, Inc. v. Tulsa General Drivers, Warehousemen and Helpers, Local 523*, 597 F.2d 227, 230 (10th Cir. 1979). The Seventh Circuit has stated that in a section 301 case the prevailing party is entitled to fees only when the opponent's suit was "frivolous," that is, brought in bad faith to harass rather than to win. *See Local 879, Allied Industrial Workers of America, AFL-CIO v. Chrysler Marine Corporation*, 819 F.2d 786, 791 (7th Cir. 1987); *Miller Brewing Company v. Brewery Workers Local Union No. 9*, 739 F.2d 1159, 1162 (7th Cir. 1984), *cert. denied*, 469 U.S. 1160, 105 S. Ct. 912, 83 L. Ed. 2d 926 (1985).

In this case the record does not show that CMC's refusal to abide by the arbitrator's award was without justification or that it was merely a frivolous, dilatory tactic. CMC's challenge was based upon a reasonable

inquiry into the law, even though the challenge ultimately failed.

The issue of whether and under what circumstances a court should vacate an arbitration award on public policy grounds is a question which has been hotly litigated in the two years since the United States Supreme Court attempted to set the contours of the public policy exception in *United Paperworkers International Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 108 S. Ct. 364, 98 L. Ed. 2d 286 (1987). Following *Misco*, the Seventh Circuit has not reevaluated the public policy exception in a case involving employee misconduct.[12] And, it was not until after CMC commenced this case that the Ninth Circuit, sitting *en banc*, issued a comprehensively researched and reasoned opinion dealing with the application of the public policy exception to reinstatement remedies. *See Stead Motors of Walnut Creek v. Automotive Machinists Lodge No. 1173, International Association of Machinists and Aerospace Workers*, 886 F.2d 1200 (9th Cir. 1989) (*en banc*).[13]

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[12] The Seventh Circuit did discuss the public policy exception in *Sheet Metal Workers Local Union No. 20 v. Baylor Heating and Air Conditioning, Inc.*, 877 F.2d 547 (7th Cir. 1989) where an interest arbitration clause in a prehire collective bargaining agreement was unsuccessfully challenged as being violative of public policy.

[13] As discussed in Part III(A)(2), above, the Ninth Circuit held in *Stead Motors* that no identified public policy barred reinstatement of an employee who had improperly serviced a car's wheel assembly. However, the court was divided. Only a plurality of eleven judges of the Ninth Circuit, sitting *en banc*, reversed a three-judge panel of the same court, 843 F.2d 357 (9th Cir. 1988), which had affirmed a district court's order

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Because the law in this area is unsettled and rapidly evolving, and because the question of whether an arbitrator's award violates public policy is a question for the court to decide,[14] the court concludes that the plaintiff's challenge to the award was reasonably justified and finds that there is no evidence of bad faith or frivolous, dilatory tactics. Consequently, the court will not award attorney fees to the Unions. *See Sheet Metal Workers Local Union No. 20 v. Baylor Heating and Air Conditioning, Inc.*, 688 F. Supp. 462, 474 (S.D. Ind. 1988) (no fees awarded where law unsettled), *aff'd*, 877 F.2d 547 (7th Cir. 1989); *Brigham & Women's Hospital v. Massachusetts Nurses Association*, 684 F. Supp. 1120, 1125 (D. Mass. 1988) (no fees awarded where circuits in disagreement); *Peter Cooper Corporations v. United Electrical, Radio and Machine Workers of America, Local 1132*, 472 F. Supp. 692, 696 (E.D. Wis. 1979) (no fees awarded due to "unsettled nature of caselaw decisions").

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vacating an arbitrator's award on public policy grounds. Two of the eleven judges dissented from the plurality opinion, while another judge filed an opinion concurring in part and dissenting in part. Two additional judges joined in this opinion and one other judge joined in part.

[14] *See Sheet Metal Workers Local Union No. 20 v. Baylor Heating and Air Conditioning, Inc.*, 877 F.2d 547, 551 (7th Cir. 1989); *Board of County Commissioners of Lawrence County, Ohio v. L. Robert Kimball and Associates*, 860 F.2d 683, 686 (6th Cir. 1988), citing *W.R. Grace & Company v. Local Union 759, International Union of United Rubber, Cork, Linoleum & Plastic Workers of America*, 461 U.S. 757, 766, 103 S. Ct. 2177, 2183, 76 L. Ed. 2d 298 (1983).

ORDER

Because there are no material facts in dispute and because the defendant Unions are entitled to summary judgment as a matter of law, the court ORDERS that the Defendants' Motion for a Summary Judgment Dismissing Plaintiff's Complaint and for a Summary Judgment Granting Defendants' Counterclaim (filed September 14, 1989) IS GRANTED IN PART AND DENIED IN PART. *See* Federal Rule of Civil Procedure 56. Summary judgment is granted in favor of the defendants on all the claims contained in the plaintiff's complaint; the July 24, 1989, award of Arbitrator Jay E. Grenig is affirmed and shall be enforced; the defendants are not entitled to prejudgment interest; and the costs of this action are awarded to the defendants. Attorney fees are denied to the defendants.

IT IS FURTHER ORDERED that Plaintiff Chrysler Motors Corporation's Cross-Motion for Summary Judgment (filed October 3, 1989) IS DENIED.

IT IS FURTHER ORDERED that this action IS REMANDED to Arbitrator Jay E. Grenig for a computation of the monetary amount of the award. *See United Steelworkers v. Enterprise Wheel & Car Corporation*, 363 U.S. 593, 599, 80 S. Ct. 1358, 1362, 4 L. Ed. 2d 1424 (1960).

IT IS FURTHER ORDERED that, pursuant to Federal Rule of Civil Procedure 58, the Clerk of Court shall enter judgment as a separate document. The judgment shall provide that:

This action came on for hearing before the Court, Honorable Thomas J. Curran, District Judge, presiding,

and the issues having been duly heard and a decision having been duly rendered,

IT IS ORDERED AND ADJUDGED

that, as prayed for in the counterclaim of defendants International Union, Allied Industrial Workers of America, AFL-CIO and Local 793, plaintiff Chrysler Motors Corporation's complaint is dismissed with prejudice; the July 24, 1989, award of Arbitrator Jay E. Grenig is affirmed and shall be enforced; prejudgment interest is denied; and that plaintiff Chrysler Motors Corporation shall pay defendants International Union, Allied Industrial Workers of America, AFL-CIO and Local 793 their costs of this action.

IT IS FURTHER ORDERED AND ADJUDGED

that attorney fees for defendants International Union, Allied Industrial Workers of America, AFL-CIO and Local 793 are denied.

IT IS FURTHER ORDERED AND ADJUDGED

that this action is remanded to Arbitrator Jay E. Grenig for a computation of the monetary amount of the award.

Done and Ordered.

APPENDIX C

In the Matter of the Arbitration Proceedings

Between

CHRYSLER MOTORS CORP.,

Employer,

and

Arbitrator's Award

LOCAL 793, ALLIED INDUSTRIAL WORKERS OF AMERICA, AFL-CIO,

Union

Involving the Discharge of Ronald Gallenbeck

Arbitrator: Jay E. Grenig

Appearances:

For the Employer: A.L. Biache, Jr., Esq.
Union Relations
Chrysler Corporation

For the Union: Kenneth R. Loebel, Esq.
Attorney at Law
Habush, Habush & Davis

I. BACKGROUND

The grievance in this matter was heard by Arbitrator Jay E. Grenig on June 16, 1989, in Beaver Dam, Wisconsin. The parties were given full opportunity to present all relevant evidence and arguments. Upon receipt of the parties' briefs, the hearing was declared closed on July 6, 1989.

II. ISSUE

The issue before the Arbitrator is as follows:

Was the discharge of Ronald Gallenbeck on January 10, 1989, for good cause? If not, what is the appropriate remedy?

III. PERTINENT CONTRACT PROVISIONS

ARTICLE III

Grievance Procedure

. . .

Section 3.02. . . .

Step 5. The Corporation and the Union shall choose an arbitrator. . . . The decision of the arbitrator shall be final and binding on all parties. The arbitrator shall have authority only to decide questions as to the meaning and application of the terms of this Agreement, and such arbitrator shall have no authority to . . . add, delete or modify any of the terms of this Agreement.

ARTICLE IV

Seniority

. . .

Section 4.90. Seniority shall cease upon:

a. Quitting.

b. Discharge for good cause.

. . .

ARTICLE IX

General

Section 9.01. The Corporation has the right to hire, to increase and decrease hours, to discipline or discharge for proper cause, to transfer employees from one job assignment to another and to lay off employees from duty because of lack of work, but the exercise of these rights shall not conflict with the provisions of this Agreement.

IV. FACTS

The Grievant began work with the Employer at its Beaver Dam Marine and Industrial Products facility on October 27, 1987, as a Fork Lift Operator Trainee. He was discharged effective January 10, 1989. The notice of termination stated, in pertinent part, as follows:

> On Monday, January 9, 1989, [B], a contract employee of Boyd-Hunter, Inc., assigned to the Chrysler Marine Corporation Warehouse, advised [the Production Control Manager] that she was sexually assaulted by [the Grievant], who approached [B] from behind, reached around her body and fondled her breasts. [B] also advised [C] of Boyd-Hunter, Inc., of the incident, stating she would file criminal charges if [Grievant] was not removed from the warehouse.

At the time of his discharge, the Grievant was a Group Leader working in a warehouse approximately six miles from the Beaver Dam facility. B was employed by Boyd/Hunter Employment Agency, which had an inspection contract with one of the Employer's suppliers. B also worked at the warehouse.

The Grievant was at work on January 5, 1989, when he received a telephone call. During the course of his telephone conversation, he put the telephone receiver on the desk and walked over to B, while B was inspecting door trim panels for defects. While she was inspecting a door panel, the Grievant came up behind her, reached under her extended arms, grabbed her breasts, and squeezed them. B screamed and the Grievant returned to the telephone, where he stated, "Yup, they're real."

B contacted an attorney regarding the incident that night. She reported the incident to the Boyd/Hunter's manager the next morning. When the Employer learned of the incident on Monday, January 9, the Grievant's supervisor and the Union president went to the warehouse. They spoke with the Grievant, who admitted to having grabbed B's breasts.

The supervisor informed the Personnel Manager of Grievant's admission and the Grievant was suspended from work. The situation was discussed with the Employer's legal staff in Detroit and the suspension was converted to a discharge effect January 10, 1989.

On January 12, 1989, the Grievant filed a grievance, stating, in pertinent part, as follows:

> The Aggrieved feels that retaliation has occurred stemming form the Alleged allegations. The Co. dismissal of the aggrieved was to severe. The Co. should fully consider the time of service and over all work performance of the aggrieved.

The grievance asked for the following remedy: "Full reinstatement with full backpay and all alleged allegations removed from his record."

The grievance was denied and the issue submitted for resolution in this arbitration proceeding.

B testified at the arbitration hearing that the Grievant had grabbed her before. She testified that when she came out of the break room, he'd grab her on the "hinder" and pinch her "hinder." She said that he'd "done it to other girls." B stated that she had reported the incidents to the manager at Boyd/Hunter.

The Boyd/Hunter group leader at the warehouse testified that there had been at least one other incident of the Grievant grabbing a female co-worker. He said that the co-worker never complained to his knowledge.

During the Grievant's employment with the Employer, he never received any discipline and he never missed a day of work. During this period he frequently worked six or seven days a week and ten-hour days.

The Union president testified at the hearing that sometime in December 1988 B told him that she was going to do whatever she had to do to get rid of "that son of a bitch" – meaning the Grievant.

Employer witnesses testified that the Grievant had engaged in conduct similar to that with which he is charged here in the past, although he had never been disciplined for the conduct.

The Employer's Production Control Manager testified that the Employer utilizes a corrective or progressive disciplinary system.

V. POSITIONS OF THE PARTIES

A. THE EMPLOYER

The Employer argues that the Grievant's conduct constituted "sexual harassment/sexual assault and battery." The Employer states that arbitrators have uniformly held that discharge is the appropriate discipline in cases of sexual harassment/sexual assault and battery.

It is the Employer's position that a male employee's laying his hands on the person of a female co-employee in an indecent manner establishes and constitutes a breach of his employment contract and is grievance misconduct furnishing just cause for the male employee's dismissal.

In two cases referred to by the Employer where a discharge was reduced, the grievant had been employed for 25 years or more. In the third case, an eight-year employee's discharge was reduced to a nine-month suspension.

Claiming that there are no mitigating circumstances surrounding the Grievant's discharge, the Employer requests the Arbitrator to deny the grievance.

B. THE UNION

The Union does not dispute that the Grievant reached around "and squeezed [B's] chest", but it disputes that the Grievant ever admitted to having "sexually assaulted" B or that he had "fondled her breasts."

According to the Union, the discharge of the Grievant was totally excessive and punitive in view of all the

circumstances presented. Noting that it does not mean to minimize conduct of the kind engaged in by the Grievant, the Union asserts that there is a distinction between someone who acts out of a misguided and no longer acceptable so-called sense of humor and someone who really seeks sexual gratification. The Union argues that the Grievant's conduct was not criminal sexual assault, but was simply stupid, uncalled for, and totally insensitive.

Pointing out that the Employer has a corrective and progressive disciplinary policy, the Union contends that the Grievant did not deserve to be discharged for acting stupidly and without the Employer's so much as looking to see what kind of employee the Grievant had been and whether his record was such as to demonstrate that he could learn and still be a useful employee.

With respect to the allegations that the Grievant engaged in other misconduct prior to his discharge, the Union points out that when the Employer made its decision to discharge the Grievant it never claimed that the Grievant had engaged in such conduct in the past nor did it claim that females were fearful of the Grievant. The Union argues that a discharge decision must generally stand or fall on the evidence in possession of the Employer at the time it acted.

The Union cites several arbitration decisions in which a discharge penalty was reduced to a suspension. The arbitrators in those cases determined that the employees in question were not beyond rehabilitation. It concludes that a 15-day suspension and most certainly a 30-day suspension results in a substantial loss of wages and

clearly delivers a message that employees may no longer to engage in so-called "horseplay" involving members of the opposite sex and that to do so will result in strong disciplinary measures.

The Union asks that the grievance be sustained and that the discharge of the Grievant be deemed to have not been for good cause and that the discharge be converted to a 15 or 30-day suspension.

VI. DISCUSSION

Where the contract provides that an employee may be disciplined or discharged for just cause, proper cause, or good cause, the degree of disciple imposed must reasonably relate to the seriousness of the employee's proven offense and the record of the employee in his service with the Employer. Koven & Smith, *Just Cause: The Seven Tests* 323 (1985).

Under the principle of just cause extremely serious offenses, such as stealing or striking a foreman usually justify summary discharge without the necessity of prior warnings or attempts at corrective discipline. Less serious infractions call not for discharge for the first offense, but for some milder penalty aimed at correction. *Huntington Chair Corp.*, 24 LA 490, 491 (McCoy 1955). If the conduct is so obviously unacceptable and if all the elements of proof of theft have been solidly satisfied, the question of penalty is a closed issue. Koven & Smith, *Just Cause: The Seven Tests* 332 (1985).

Sexual harassment in the workplace is of serious concern to employers, employees, and unions. Sexual

harassment includes unwelcome physical conduct of a sexual nature when such conduct has the purpose or effect of creating a hostile or offensive working environment. See 29 C.F.R. § 1604.11. It includes touching or pinching. Merit System Protection Board Report, *Sexual Harassment in the Federal Work Place: Is It a Problem?* 4, 101 (1981).

There is no dispute with respect to whether the Grievant grabbed B's breasts. The only significant question is whether the penalty imposed by the Employer was appropriate under the circumstances.

According to leading treatises, in cases involving physical contact, arbitrators have sustained discharges although there was no earlier disciplinary history. Elkouri & Elkouri, *How Arbitration Works* 781 (4th ed. 1985) and 1985-87 Supplement at pp. 167-168 (1988); Ornati, "Sexual Harassment" in *Labor and Employment Arbitration* § 25.04[2] at p. 25-12 (Bornstein & Gosline eds. 1988). See also Redeker, *Discipline: Policies and Procedures* 197 (1983). An examination of the cases cited by these authorities discloses that in most, if not all, there was a prior disciplinary history or aggravating factors justifying discharge.

An arbitrator upheld the discharge of an employee who threatened to rape a fellow worker following an incident in which the employee either grabbed or pushed the fellow worker during an argument. *St. Regis Paper Co.*, 74 LA 1281 (Kaufman 1980). The arbitrator said the threat could not reasonably be regarded as playful. In

addition, the employee had on two prior occasions physically assaulted the co-worker, touched her, tried to kiss her, and picked her up.

In *Monsanto Chemical Intermediates Co.*, 75 LA 592 (Penfield 1980), while two male employees called a female co-worker down to the supply room. When she entered the room, the two employees locked the door and forcibly wrestled the woman to a couch. One of the employees held her down while the other attempted to take off her clothes. The woman was subsequently released. The employer's suspension of the two employees for 30 days was upheld by an arbitrator.

In *Borg-Warner Corp.*, 78 LA 985 (Neas 1982), the discharge of an employee for calling a female supervisor a "faggot" and making obscene gestures was upheld. The arbitrator found that the employee had previously been given two disciplinary suspensions and had failed to respond to corrective discipline.

A supervisor's discharge for sexual harassment was upheld in *University of Missouri*, 78 LA 417 (Yarowsky 1982). The supervisor had put his arm around the waist of a female employee, looking and smacking his lips and commenting on the attractiveness of another employee and casting penetrating looks at a third employee to the point that employee imagined herself "undressed." The supervisor had previously been warned about his conduct. The evidence established that the employee's conduct had created an atmosphere of stress and anxiety among female employees.

The discharge of an employee was upheld, where it was found that the employee had relentlessly harassed a

female co-worker through obscene gestures and demeaning slurs. *Anaconda Copper Co.*, 78 LA 690 (Cohen 1982). The arbitrator concluded that the employee's relentless harassment of the co-worker created an intimidating, hostile, or offensive working environment. In an effort to resolve the harassment problem, the employee had been given a job transfer and verbally warned that if he continued to bother the co-worker his job was in jeopardy.

According to one arbitrator, the penalty of discharge was too severe for a 28-year employee who pinched a female co-worker on her left breast while making kissing sounds. *Dayton Power & Light Co.*, 80 LA 19 (Heinsz 1982). Although he found there was no evidence that the employee's work was deficient or that he had past discipline problems involving sexual misconduct or any other kind of difficulties, the arbitrator observed:

> [T]he Grievant's acts were clearly disgraceful. Such sexual advances interferes [sic] with the privacy and degrades [sic] the dignity of the co-employees. Sexual harassment has served as a barrier to females in our industrial setting. It is an impediment which must be removed and dealt with seriously.

80 LA at 21.

In *Fisher Foods, Inc.*, 80 LA 133 (Abrams 1983), an employer suspended a stockman for touching the breast of a sales representative of a product distributor while she was in the employer's store preparing a report.

An arbitrator upheld the discharge of a janitor who forcibly grabbed the arm of a nurse's aide, leaned over and kissed her on the cheek while the aide was preparing

a patient's bath, causing the aide to become frightened, nervous, upset, and hysterical. *Care Inns, Inc.*, 81 LA 687 (Taylor 1983). The arbitrator wrote:

> In this case I feel that Management has correctly distinguished between a serious offense which usually justifies summary dismissal and those offenses which are less serious and which call for a lesser penalty aimed at correction. There are many offenses, such as theft, assaults, destruction of Company property, drunkenness on the premises, etc., where progressive discipline is not required and summary discharge is justified. Sexual harassment involving unwanted physical contact falls in this category. Thus, . . . it is not mandatory that Management sit idly by and watch the Grievant's conduct become progressively worse before removing the cause of all the trouble. Therefore, a charge of this nature should not and cannot be treated lightly.

81 LA at 694.

The discharge of an employee with an unblemished 24-year work record was upheld where the employee had grabbed, hugged, and kissed a co-worker on three separate occasions. *Zia Co.*, 82 LA 640 (Daughton 1984).

Nabisco Foods Co., 82 LA 1186 (Allen 1984), involved the discharge of a deliveryman for making sexual propositions to customers over a period of several years at retail stores. The arbitrator found that the employee's effectiveness as a deliveryman for the employer had been severely damaged by his repeated improper misconduct, that the employee had been warned repeatedly about the

behavior, and that he had been provided ample opportunity to "change his ways" but he chose not to be "rehabilitated."

In *United Electric Supply Co.*, 82 LA 921 (Madden 1984), an employer was held to have properly discharged a warehouseman with a poor work record who had made persistent and continued advances to several female coworkers. The arbitrator found that the employee's work record gave no hope that further corrective measures would be justified.

The discharge of an 11-year employee who was charged with sexual harassment of female employees was upheld in *New Industrial Techniques, Inc.*, 84 LA 915 (Gray 1985). After two employees had complained about the employee's verbal and physical sexual advances, he had been given a warning. When two new employees made sexual harassment complaints a year later, the Grievant was discharged.

A 15-day suspension, rather than discharge, was found to be the appropriate penalty for a hotel's assistant banquet manager, who was discharged after he exposed himself to a female employee during work hours and after the employer's investigation disclosed prior incidents of sexual harassment with a second female employee. *Hyatt Hotels Palo Alto*, 85 LA 11 (Oestriech 1985). The arbitrator held that the employer had failed to show that the manager could not be rehabilitated.

In *Rockwell International Corp.*, 85 LA 246 (Feldman 1985), an employee was discharged for touching three female employees without permission, for using body language that made the women uncomfortable, and for

making suggestive comments. Upholding the discharge, the arbitrator wrote:

> His conduct is not to be tolerated in the work-place and certainly any employee, no matter the sex, is allowed a safe place to work and as a matter of fact the company is so charged.

85 LA at 251.

The discharge of a public employee who made sexual comments to a number of clients of a county human services department was reduced to a 30-day suspension in *County of Ramsey*, 86 LA 249 (Gallagher 1986). The arbitrator explained his decision as follows:

> Although the grievant's sexual statements to clients were numerous and, especially in the case of L.B., graphic, his conduct was not physical – a more serious kind of sexual misconduct. In 1983, the Employer decided not to discharge, but to suspend for thirty days, a chemical dependency counselor who used his position to have sexual intercourse with one of his clients. . . . Certainly, that physical misconduct was more serious than the spoken misconduct of the grievant in the present case. Although the Employer should not be held to a requirement of strict consistency in dealing with such offenses, there is reason in the present case – the grievant's long record of employment without any discipline – to give the grievant a similar opportunity to show that he will not repeat his misconduct.

86 LA at 254.

An arbitrator found the penalty of discharge was too severe for a shipping employee who hovered around a

female employee in the data processing area during a power failure, making her obviously uncomfortable. *Sugardale Foods, Inc.*, 86 LA 1017 (Duda 1986). Although the discharged employee had touched the female employee "briefly on the buttocks and in the crotch area," the arbitrator noted that the touching was of a very short duration and the employee had 25 years of service with no discipline for similar incidents. According to the arbitrator, discipline short of discharge was adequate to demonstrate to all employees the Company's firm resolve in respect to sexual harassment. He also found that a long, extended suspension was adequate to deter the employee from any repeat of sexual harassment.

In another case involving physical contact, an employee was discharged for moving his finger in an upward movement between the buttocks of a female co-worker. *Boys Markets Inc.*, 88 LA 1304 (Wilmoth 1987). The arbitrator wrote:

> A careful review of the arbitration awards reported in BNA's *Labor Arbitration Reports*, Volumes 81 through 85, discloses that of the ten "sexual" harassment cases reported discharge was sustained in only five and in four of that five . . . each of the grievants was accused of overt acts committed on more than one occasion.

88 LA at 1306. The arbitrator reduced the discharge and ordered the employee reinstated without backpay.

Can-Tex Industries, 90 LA 1230 (Shearer 1988), involved the discharge of a 21-year employee who had constantly and pervasively subjected a female co-worker to verbal sexual harassment. He constantly referred to the

co-worker as "bitch" or as "fat ass." He frequently grabbed at her breasts. The employee often greeted the co-worker with "Do you want to fuck?" The co-worker repeatedly told the employee to stop. After the co-worker complained to her supervisors, the employee was given a warning. When the harassment continued, the employee was discharged. Upholding the discharge, the arbitrator characterized the employee's conduct as reprehensible and noted the employee's contempt for common decency.

Nothing in the record suggests that the Employer looked into any of the allegations of prior sexual harassment introduced in evidence before the decision to discharge the Grievant was made. A discharge decision must generally stand or fall on the evidence which the employer had in possession at the time it acted. Elkouri & Elkouri, *How Arbitration Works* 193-676 (4th ed. 1985). Arbitrators expect the charge which the employer offers proof to be the charge for which discipline was originally imposed, not something the employer cites for the first time at the arbitration hearing. Koven & Smith, *Just Cause: The Seven Tests* 202 (1985). See also *Beck's Transfer, Inc.*, 71-2 ARB ¶8490 (Witney 1971) (post-discharge charges of pre-discharge dishonesty thrown out by arbitrator); *Dubuque Lorenz, Inc.*, 66 LA 1245 (Sinicropi 1976) (arbitrator refused to take into account charges of post-discharge complaints about pre-discharge misconduct of which the grievant had not been charged). But see *American Airlines, Inc.*, 46 LA 737, 739 (Sembower 1966) (post-discharge complaints of pre-discharge misconduct may be considered with respect to severity of discipline meted out).

The discharge notice to the Grievant specified only the incident involving B on January 5. Nothing was said about any other sexual harassment incidents. In addition, the Employer's response at the fourth step of the grievance procedure referred only to the January 5, 1989, incident. Thus, it appears that the Employer did not consider evidence of any other incidents when it decided that discharge was the appropriate penalty in this case.

In the 18 reported cases involving sexual harassment reviewed above, the employer suspended the employee for sexual harassment in three of them. (75 LA 592, 80 LA 133, 90 LA 1230.) In the remaining 15 cases in which the employer discharged the employee, the employee had been warned or previously disciplined for his conduct before the incident precipitating his discharge in four of the cases. (78 LA 985, 78 LA 417, 82 1186, 84 LA 915.)

Of the 11 cases which did not involve either suspension by the employer or prior disciplinary warnings or suspensions, the arbitrator reduced the discharge to suspension in five of them. (80 LA 19, 85 LA 11, 86 LA 249, 86 LA 1017, 88 LA 1304.) Of the remaining six cases, five of them involved multiple incidents or persistent harassment. (74 LA 1281, 78 LA 690, 82 LA 640, 82 LA 921, 85 LA 246.)

Of the 18 cases reviewed, in only one of them (81 LA 687) did the arbitrator uphold the discharge where the employee had not previously been warned or disciplined or where the harassment did not involve multiple incidents or persistent harassment.

Although these published decisions represent only a small portion of all arbitration decisions involving sexual

harassment during that period (BNA publishes only a small number of decisions submitted for publication), it does not appear that arbitral thought supports the proposition that sexual harassment is such an extremely serious offense that rehabilitation is no longer a concern so that it usually justifies summary discharge without the necessity of prior warnings or attempts at corrective discipline. See *Boys Markets Inc.*, 88 LA 1304, 1306 (Wilmoth 1987).

This is not to say that sexual harassment cannot be tolerated in the workplace. All employees, regardless of gender, are entitled to a place to work free of hostility and offensive conduct. Acts such as that of the Grievant here are outrageous. The Grievant interfered with the privacy and degraded the dignity of B.

A system of progressive discipline, such as the Employer has in effect here and as recognized by the collective bargaining agreement's provisions relating to good cause and proper cause, has the objectives of establishing a system of penalties for misconduct and putting an employee on notice that he or she may be on the road to trouble unless the employee's behavior is corrected. Nonetheless, the evidence does not indicate that the Grievant could not be rehabilitated and correct his behavior. Although not a long term employee, the Grievant had a blemish free disciplinary record prior to his discharge and was considered to be a good employee. Furthermore, the Grievant was charged with and dismissed for one incident of sexual harassment compared with the numerous incidents present in those cases in which summary discharge was upheld.

Severe discipline short of discharge should be adequate to demonstrate to all employees the Employer's opposition to sexual harassment and to deter the Grievant from any repeat of his disgraceful conduct. Because the penalty here was too severe under all the circumstances, it is concluded that there was not good cause to discharge the Grievant. However, there was good cause to suspend the Grievant for 30 workdays.

VII. AWARD

Having considered all the relevant evidence and the arguments of the parties, it is concluded that the discharge of Ronald Gallenbeck on January 10, 1989, was not for good cause. However, there was good cause to suspend the Grievant for 30 workdays.

Accordingly, the Employer is directed to reduce the Grievant's discharge to a 30-workday suspension and to reinstate and otherwise make the Grievant whole for all lost benefits except for that period constituting the 30-workday suspension. The backpay is to be reduced by the Grievant's earnings since his discharge.

In the event there is a dispute with respect to computation of the remedy, the Arbitrator retains jurisdiction for a period of 60 days from the date of this award to hear and determine that issue only.

Executed at Waukesha, Wisconsin, this twenty fourth day of July, 1989.

Jay E. Grenig

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

CHRYSLER MOTORS CORPORATION,

Plaintiff,

v.

Case No. 89-C-999

INTERNATIONAL UNION, ALLIED INDUSTRIAL WORKERS OF AMERICA, AFL-CIO and LOCAL 793,

Defendants.

[Filed May 1, 1992]

ORDER

The court ORDERS that the "Motion to Have Chrysler Motors Corporation Cited for Contempt for Its Failure to Comply With This Court's Injunctive Order Dated January 26, 1990 and Which Was Affirmed by the Seventh Circuit of Appeals on April 3, 1992" (filed April 30, 1992) IS DENIED. The record shows that Chrysler did reinstate Ronald Gallenbeck in compliance with this court's order. Any subsequent discharge was not addressed in the original arbitration award which this court reviewed.

Done and Ordered in Chambers at the United States Courthouse, Milwaukee, Wisconsin this 1st day of May, 1992.

Thomas J. Curran
United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

CHRYSLER MOTORS CORPORATION,

Plaintiff,

Case No. 89-C-999

v.

INTERNATIONAL UNION, ALLIED INDUSTRIAL WORKERS OF AMERICA, AFL-CIO and LOCAL 793,

Defendants.

[Filed May 12, 1992]

ORDER

Based on the moving papers of the defendants in the above-captioned case, the court ORDERS that the "Defendants' Motion Under Rule 59 Federal Rules of Civil Procedure to Have the Court Reconsider Its Order of May 1, 1992" (filed May 8, 1992) IS DENIED. The defendants have presented no new facts or legal authority which would warrant reconsideration of the court's May 1, 1992 ruling. *See Quaker Alloy Casting Company v. Gulfco Industries, Inc.*, 123 F.R.D. 282, 288 (N.D. Ill. 1988).

Done and Ordered in Chambers at the United States Courthouse, Milwaukee, Wisconsin this 12th day of May, 1992.

Thomas J. Curran
United States District Judge

APPENDIX F

RULE 29.1 LIST OF NON-WHOLLY OWNED SUBSIDIARIES OF CHRYSLER CORPORATION

Acuflight, Inc.

Chrysler Comercial S.A. de C.V.

Chrysler de Mexico S.A.

Chrysler Life Insurance Company of Canada

Eurostar Gesellschaft m.b.H.

Eurostar Gesellschaft m.b.H. & Co. KG

Jeep Africa, Ltd.

New Venture Gear, Inc.

Orco-Trac, Inc.

Thrifty Europe, S.A.

Thrifty System International, Pty. Limited

TRAC Asia Pacific, Inc.

TRAC Nederland, B.V.

TRAC System, S.A.

2426-3303 Quebec, Inc.

Supreme Court, U.S.
FILED
AUG 19 1992
OFFICE OF THE CLERK

No. 92-38

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

CHRYSLER CORPORATION,
Petitioner,

v.

INTERNATIONAL UNION, ALLIED INDUSTRIAL WORKERS OF AMERICA, AFL-CIO; and LOCAL 793 THEREOF,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-38

CHRYSLER CORPORATION,
Petitioner,

v.

INTERNATIONAL UNION, ALLIED INDUSTRIAL WORKERS OF AMERICA, AFL-CIO; and LOCAL 793 THEREOF,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

RESPONDENTS' BRIEF IN OPPOSITION

The Respondents, International Union, Allied Industrial Workers of America, AFL-CIO and Local 793 thereof (hereinafter "Union"), respectfully request this Court to deny the petition for a writ of *certiorari* to the United States Court of Appeals for the Seventh Circuit for review of the judgment in *Chrysler Motors Corp. v. International Union, Allied Industrial Workers of America, AFL-CIO and Local 793*, 959 F.2d 685 (7th Cir. April 3, 1992).

COUNTER STATEMENT OF THE CASE

A. *The Current Procedural Status.*

The Petitioner, Chrysler Corporation (hereinafter "Chrysler") has not provided to this Court the complete and current procedural status of these proceedings. In its petition Chrysler only notes that, ". . . After the Court of Appeals entered judgment, the district court found the Union's contempt motion to be meritless . . ." (Chrysler Pet. p. 9, n. 3).

Chrysler failed to add that the Union on May 18, 1992 appealed the district court's May 1, 1992 order referred to by Chrysler (Pet. App. 63a) and that the Union's appeal is pending before the Seventh Circuit in *Chrysler Corp. v. Int'l Union AIW*, 7th Cir. Dkt. No. 92-2215, filed May 18, 1992.[1]

---

[1] What gives rise to this present procedural state of affairs is that after the district court had issued its original judgment on January 26, 1990 (Pet. App. 43a), Chrysler did not reinstate the Grievant nor did Chrysler seek any stay of the district court's judgment. Chrysler instead filed a notice of appeal; wrote the Grievant and informed him that he was being reinstated; provided him one day's pay; and simultaneously informed him that he was discharged effective that same date, i.e., March 6 ,1990. (A copy of Chrysler's letter to the Grievant dated March 6, 1990 is attached to this brief as App. 1).

The Union's appeal to the Seventh Circuit is predicated upon 28 U.S.C. § 1292(a)(1) in that the district court's May 1, 1992 order giving effect to Chrysler's second discharge of the grievant was tantamount to the dissolution of the injunction, the validity of which had shortly before been affirmed by the Seventh Circuit in *Chrysler Motor Corp. v. Int'l Union, Allied Industrial Workers of America, et al.*, 959 F.2d 685 (7th Cir. April 3, 1992) (Pet. App. 1a-11a). The Union position in this regard is that Chrysler's "reinstatement" and simultaneous discharge of the Grievant does not constitute good faith compliance with the award as enforced by the district court and affirmed by the Seventh Circuit. *See Chicago Newspaper Guild v. Field Enterprises Inc.*, 747 F.2d 1153, 1156-1157 n.5 (7th Cir. 1984). See also *Aluminum Workers Int'l Union v. Chromalloy Amer. Corp.*, 489 F.Supp. 536, 543 (N.D. Miss. 1980); *Wilks v. Amer. Bakeries Inc.*, 563 F.Supp. 560 (W.D. N.C. 1983).

It was after the Union filed this appeal that Chrysler subsequently filed its petition for *certiorari* in the instant case.[2]

B. *The Decisions Below.*

Like its account of the present procedural status of this case, Chrysler's account of the prior arbitration and judicial decisions in this case is quite selective.

(1) *The Arbitration Decision.* Chrysler claims that the investigation that the Employer first conducted *after* having discharged the Grievant "revealed that the [Grievant] had engaged in a pattern of sexual harassment and sexual assault in the work place" (Chrysler Pet. 5). But, the arbitrator's statement of the "Facts" notes that there was testimony at the arbitral hearing of other incidents alleged to be sexual harassment. The arbitrator, however, made no findings either as to whether those incidents occurred, or whether the incidents amount to a "pattern of sexual harassment and sexual assault." The arbitrator declined to decide those factual questions because

> Nothing in the record suggests that [Chrysler] looked into any of the allegations of prior sexual harassment introduced in evidence before the decision to discharge the Grievant was made. A discharge decision must generally stand or fall on the evidence which the employer had in possession at the time it acted . . . Arbitrators expect the charge for which discipline

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[2] According to the district court Chrysler had satisfied its obligation under the award to reinstate the Grievant when on March 6, 1990 the Employer "reinstated" him, provided him a day's pay and simultaneously discharged him. If the district court's order of May 1, 1992 is correct, then the issue of whether Chrysler is under a duty to reinstate the grievant under the arbitration award has been made moot by Chrysler's conduct as Chrysler would have demonstrated that it was free to discharge the Grievant for his alleged acts of sexual harassment.

> was originally imposed, not something the employer cites for the first time at the arbitration hearing. [Pet. App. 59a.]

The arbitrator's decision accompanying the award, far from ignoring or minimizing the public policy concerns surrounding sexual harassment allegations, gave extensive attention to those concerns as part of the "just cause" determination. That decision, first, pointed out that "Sexual harassment in the workplace is of serious concern to employers, employees, and unions," and noted that "Sexual harassment includes unwelcome physical conduct of a sexual nature when such conduct has the purpose or effect of creating a hostile or offensive working environment." *See* 29 C.F.R. § 1604.11. (Pet. App. 52a.) Further, the arbitrator expressly recognized that "Acts such as that of the Grievant here are outrageous . . . [and] interfere[] with the privacy and dignity of [female employees]." (Pet. App. 51a.)

The arbitrator then reviewed eighteen reported arbitration cases concerning sexual harassment claims and noted that in almost all instances in which there was either no prior warning or no evidence of multiple incidents, a lengthy suspension rather than a discharge was ordered. Applying similar principles, the arbitrator found that ". . . the evidence does not indicate that the Grievant could not be rehabilitated and correct his behavior . . ." (Pet. App. 61a) and that

> severe discipline short of discharge should be adequate to demonstrate to all employees the Employer's opposition to sexual harassment and to deter the Grievant from any repeat of his disgraceful conduct. Because the penalty here was too severe under all the circumstances, it is concluded that there was not good cause to discharge the Grievant. However, there was good cause to suspend the Grievant for 30 work days. [Pet. App. 62a.]

(2) *The Court Opinions.* The district court reviewed the arbitration award and held not simply that the en-

forcement of the award would not offend the public policy aimed at eliminating sexual harassment in the workplace, but that *the award was consonant with that policy as properly defined*. Specifically, the district court recognized both that eliminating sexual harassment at the workplace is a matter of public policy and that under Title VII and other applicable statutes the ". . . employer need not fire the offending employee in all instances." (Pet. App. 87a.) Rather, as the district court noted, the public policy in question requires that "an employer's response to alleged instances of employee harassment . . . be reasonably calculated to prevent further harassment under the particular facts." Under the facts of this case, the district court held that a thirty-day suspension without pay met that standard. (Pet. App. 37a-38a.)

The Court of Appeals opinion, in turn, was principally concerned with Chrysler's contention that the labor contract as construed by the arbitrator was discriminatory in that sexual assault was generally treated as less serious than the kinds of behavior that merit discharge without prior warnings or discipline. The Seventh Circuit responded to that "double standard" discrimination contention—pressed by the Employer as its principal argument in the appellate court but now, apparently, abandoned—by finding that the arbitration decision did not rest on a discriminatory general standard, but on the conclusion that the Grievant's *particular* conduct was not serious enough to justify discharge without prior discipline. (Pet. App. 6a.)

The Court of Appeals, moreover, did not reach the broad question Chrysler seeks to have this Court address: what is the general standard for determining when arbitral reinstatement of a sexual harasser violates public policy. Instead, the Seventh Circuit concluded only that given the Grievant's actual behavior and circumstances, his reinstatement did not violate the public policy requiring the eradication of sexual harassment in the work-

place. (Pet. App. 7a-8a.) And the Seventh Circuit specifically *declined* to disapprove (or approve) the decisions holding that under some circumstances arbitral reinstatement of an employee can violate public policy although the reinstatement is not itself illegal, noting that in those cases, unlike this case, the behavior at issue involved "integral to job performance and threatening public health or safety." (Pet. App. 8a, n.3.)

REASONS FOR DENYING THE WRIT

I. THE ENFORCEMENT OF THE ARBITRATION AWARD HERE IS ENTIRELY CONSISTENT WITH THIS COURT'S DECISION IN *PAPERWORKERS v. MISCO, INC.*, 484 U.S. 29 (1987) AND WITH THE DECISIONS OF OTHER COURTS OF APPEALS CONCERNING THE VACATION OF ARBITRATION AWARDS REINSTATING EMPLOYEES CHARGED WITH SEXUAL HARASSMENT

Chrysler argues that the arbitration award in this case suspending and then reinstating an employee discharged for committing a single act of sexual harassment necessarily violates public policy and should have been vacated. Nothing in *Paperworkers v. Misco*, 484 U.S. 29 (1987) provides a basis for so draconian a rule, and no court of appeals opinion conflicts with the Seventh Circuit's conclusion that there is no such "public policy" rule.

(a) This case is all but a carbon copy of the case before this Court in *Misco* where this Court dealt with the public policy defense to the enforcement of an arbitration award requiring the reinstatement of an employee.

The only difference is that in *Misco* the public policy claimed to be offended by the arbitrator's reinstatement award was the threat posed to work place safety, *e.g.*, 484 U.S. at 34-35, while in the instant case Chrysler claims the arbitrator's award violates the public policy aimed at eliminating sexual harassment in the work place (Chrysler Pet. 10) ("The court of appeals' decision to enforce that reinstatement order is inconsistent with

the public policy of this Nation to end work place sexual harassment . . .").

In *Misco* this Court pointed out that the recurring issue of safety in the workplace is grist for the arbitral mill. 484 U.S. at 45 n.11. The same is true of sexual harassment in the workplace. *See* Elkouri & Elkouri, *How Arbitration Works*, Protecting Against Sexual Harassment pp. 777-781.

The impartial arbitrator in the instant case—who was chosen by the parties—recognized that the Grievant's conduct constituted sexual harassment under 29 C.F.R. § 1604.11 and stated, ". . . The only significant question is whether the penalty imposed by the Employer was appropriate under the circumstances . . ." (Pet. App. 52a). The arbitrator here, in arriving at his answer to that question, reviewed some eighteen reported awards in cases that dealt with employee discipline for having engaged in sexual harassment (Pet. App. 52a-60a). The arbitrator here, moreover, gave consideration to the same seven factors (Pet. App. 51a) that were considered by the arbitrator in *Misco*, 484 U.S. at 34 n.5. Also, the arbitrator here refused to permit Chrysler to rely on later acquired evidence first introduced at the arbitration hearing to support its decision to discharge the Grievant which evidence Chrysler had not relied on at the time it made its discharge decision. (Chrysler Pet. App. 59a).[3] The arbitrator had done the same in *Misco*, 484 U.S. at 34 n.6.

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[3] The arbitrator permitted Chrysler to introduce such evidence. The arbitrator held however that the evidence could not be used to support the discharge decision. The arbitrator did not *hold* that such evidence could not be taken into account in arriving at his determination that a 30 workday suspension would be justified. It should be noted that *Misco* was decided five years ago and Chrysler has made no showing as to why a full investigation could not have been conducted before making its decision to discharge the Grievant. The tactic of trial by "ambush" has been frowned on for years.

In the end Chrysler's *certiorari* petition reflects nothing more profound than the Employer's disagreement with the impartial arbitrator's findings that "Severe discipline short of discharge should be adequate to demonstrate to all employees the Employer's opposition to sexual harassment and to deter the Grievant from any repeat of his disgraceful conduct . . ." (Pet. App. 62a), and that ". . . the evidence does not indicate that the Grievant could not be rehabilitated and correct his behavior . . ." (Pet. App. 61a).

(b) Notwithstanding these findings by the impartial arbitrator, Chrysler argues that the policy against sexual harassment is fundamentally different from other public policies protecting the general public and fellow employees. Chrysler's contention, at bottom, is that the public policy that governs here requires that *any* misconduct involving sexual harassment be subject to the automatic penalty of discharge or to the employer's absolute discretion to impose any penalty the employer deems fit and proper. *See* Chrysler Pet .10.

But, as articulated by Congress and the courts, the governing public policy does not require automatic discharge as the penalty whenever there is employee misconduct that constitutes sexual harassment in one form or another. Rather, as the Seventh Circuit recognized, Title VII requires only that "Employers must take all necessary steps to prevent sexual harassment in the workplace, such as expressing strong disapproval of the conduct and developing appropriate sanctions." 29 C.F.R. 1604.11 (d) (f) (1991). (Pet. App. 5c.)

Thus, no public policy dictates that discharge is necessary in order for employers to send a "message" that such conduct is unacceptable in the workplace. The employer can also send such a message by other means including the posting of notices on bulletin boards and otherwise communicating to and educating employees and supervisors that harassment of all kinds at the workplace, i.e.,

sexual, racial, ethnic, and religious etc. is impermissible and that employees engaging in such conduct will be subject to corrective progressive discipline up to and including discharge. The Union would, of course, gladly participate *and* cooperate in any such program aimed at eliminating all forms of harassment in the workplace and particularly the type of harassment that creates a hostile work environment for women workers.

Chrysler's view of public policy—that an employer must act "decisively" and that the employer must therefore have the total and absolute discretion to impose whatever degree of discipline the employer chooses in a case where the employee has engaged in an act of sexual harassment—is fundamentally unfair. Factors such as the employee's years of continuous service and his/her otherwise unblemished work record would be disregarded even though the employee could be rehabilitated and could correct his behavior, as the arbitrator here found was true of the Grievant. Not surprisingly, then, Chrysler is unable to cite any statute, regulation or case stating that in order to act "decisively" employers must always be free to discharge for sexual harassment.

It is precisely because management and labor can agree that an employee's conduct warrants discipline, as was true in the instant case, but still disagree on the degree of discipline that may be warranted that it is so important that the judgment of an impartial arbitrator, where arbitration has been agreed to in the parties' labor contract, should be enforced. This Court so recognized in *Misco* and the Seventh Circuit, following *Misco*, so recognized in upholding the validity of the award here.

In particular, this Court made it clear in *Misco* that where the arbitrator in directing reinstatement had found that an employee would not be likely to again engage in the conduct that had led to his discipline, a court of appeals should not upset the award on public policy grounds.

484 U.S. at 45 ("Had the arbitrator found that Cooper had possessed drugs on the property, yet imposed discipline short of discharge because he found as a factual matter that Cooper could be trusted not to use them on the job, the Court of Appeals could not upset the award because of its own view that public policy about plant safety was threatened . . .".)

(c) The Seventh Circuit's decision is not only consistent with this Court's *Misco* decision, but, also, with *Newsday, Inc. v. Long Island Typographical Union*, 915 F.2d 840, 842-43 (2d Cir. 1990), *cert. denied*, 111 S.Ct. 1314 (1991), and the other court of appeals cases concerning the application of *Misco* to discharges for sexual harassment cited by Chrysler.

Chrysler's claim that the Seventh Circuit made no effort to address the Second Circuit's public policy analysis in *Newsday* is simply incorrect. The Court of Appeals stated its agreement with *Newsday's* ruling that there is a well-defined and dominant public policy that is aimed at eliminating sexual harassment at the workplace. (Pet. App. 19.) What the Seventh Circuit held is that on the facts in *this* case, unlike those in *Newsday*, that policy did not demand the Grievant's discharge.

The Second Circuit in *Newsday* was dealing with a case where the employer had previously given a four day disciplinary suspension to an employee for having engaged in the sexual harassment of a female co-worker, a suspension upheld by an arbitrator. Subsequently, that employee, even after having been suspended and warned of the consequences, again engaged in misconduct of such a nature on three occasions. The employer then discharged him.[4]

---

[4] In *Newsday*, unlike here, the employer conducted an investigation *prior* to reaching its decision to discharge the grievant. The investigation revealed at least three incidents of sexual harassment *after* the grievant had previously been suspended for such mis-

In such circumstances, and taking into account the prior disciplinary suspension the employee had received, the Second Circuit agreed with the district court that a *second* arbitration award ordering the employer to reinstate the employee would *not* be consistent with the public policy aimed at eliminating sexual harassment at the workplace; in *Newsday* it was that second award that was not enforced.

The Grievant in the instant case, in contrast, had never before been disciplined for any misconduct. As the Seventh Circuit noted, "The arbitrator found it significant that [Grievant] had not received warning or discipline for any prior misconduct before being discharged." (Pet. App. 7a.)

To be sure, Chrysler now argues that the evidence of certain earlier alleged incidents of misconduct the Employer acquired only after discharging the Grievant—and first presented at the arbitration hearing—should be treated as the equivalent of the evidence of multiple incidents in *Newsday*.[5] But all that Chrysler's argument shows is how lax its management had been and how little Chrysler was doing to inform itself about sexual harassment in the workplace.

Even when Chrysler first learned of the incident in question here the Employer made no effort to fully in-

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conduct. The employer in such circumstances based its decision to discharge on *all three of the prior incidents* that its investigation had disclosed, and therefore the union and the employee knew prior to the arbitration hearing the basis for the employee's discharge.

[5] Arbitrators will generally not permit employers to use after-acquired evidence to support an earlier discharge decision, particularly where the after-acquired evidence is introduced for first time at the arbitration hearing. The trial courts apply a similar principle. *See Applewood Landscape & Nursery Co. v. Hollingsworth*, 884 F.2d 1502, 1507 (1st Cir. 1989). This is a simple matter of procedural fairness. As a result an employer contemplating disciplinary action must investigate fully *before* arriving at its decision and not afterwards.

vestigate into whether the Grievant had ever engaged in any such conduct in the past. And there is no evidence that Chrysler made any attempts to thereafter communicate to all of its employees that conduct involving sexual harassment is not acceptable at the workplace and that employees engaging in such conduct would be subject to discipline up to and including discharge.

In sum, the Seventh Circuit did not have the issue before it in enforcing the reinstatement award in the instant case that the Second Circuit had in *Newsday*: *viz.*, the validity of the reinstatement to the workplace of an individual who had previously received a disciplinary suspension for having engaged in sexual harassment of female co-employees, had been forewarned of the serious consequences if such conduct continued and still persisted in engaging in such conduct thereby creating a hostile work environment for women employees.

Nor is the Seventh Circuit's decision in this case inconsistent with the two other federal court of appeals cases addressing the application of *Misco* to discharges for sexual harassment. *Communication Workers v. Southeastern Electric Corp.*, 882 F.2d 467 (10th Cir. 1989), *enforced* an arbitration order reinstating an employee found to have engaged in sexual harassment on the basis that the arbitration award (like the one here) took account of the public policy concerns under all the circumstances. And, while *Strochmann Bakeries v. Local 776*, 140 LRRM 2625 (3rd Cir., June 29, 1992), recently affirmed the vacation of an arbitration award concerning alleged sexual harassment, that decision gives Chrysler no comfort.

Strochmann involved an employee who had been discharged after a customer had reported him for sexual harassment. The arbitrator had ordered the employee reinstated with full back pay because he concluded the employer had not afforded the grievant a full opportunity to refute the charge or explain his conduct. The Third

Circuit's majority opinion held only that reinstating the grievant without deciding whether the charge of sexual harassment was true conflicted with the public policy aimed at eliminating sexual harassment at the workplace. But the majority in *Stroehmann Bakeries* did not hold that an order reinstating an employee discharged for a single incident of sexual harassment is, without more, void as against public policy.

What the pertinent Court of Appeals decisions taken as a whole reveal, then, is that *Misco* is the uniform starting point from which all the court of appeals begin their public policy analysis when called upon to determine whether the enforcement of a particular arbitration award would violate a public policy.

In cases invoking the public policy of eliminating sexual harassment at the workplace the courts of appeals have carefully reviewed arbitration awards that require the reinstatement of an employee who had been found to have engaged in such an offense in order to make certain that the arbitrator's reinstatement award would not conflict with that policy.

The Seventh Circuit did so here as its decision demonstrates. The Court of Appeals concluded that the enforcement of the arbitration award which imposed a 30 work day suspension on the Grievant would not be inconsistent with public policy. The Seventh Circuit's decision is not in conflict with other courts of appeals decisions and is consistent with *Misco*. Chrysler has not shown a single good reason as to why this Court should review that decision.[6]

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[6] In an elaborate—albeit somewhat convoluted—argument, Chrysler seeks review on the separate question, not limited to the sexual harassment context, of whether an employer can seek to vacate an arbitration award on the basis of incidents of misconduct which were not the basis of the discharge. Pet. 21-27. Chrysler's contention that *Misco* sanctioned the use of after-acquired evidence for

II. THE COURT OF APPEALS OPINION DID NOT DECIDE THE QUESTION LEFT OPEN IN *PAPERWORKERS v. MISCO, INC.*, AND IS NOT IN CONFLICT WITH ANY OTHER COURT OF APPEALS OPINION ON THE GENERAL STANDARD GOVERNING THE VACATION OF ARBITRATION AWARDS ON PUBLIC POLICY GROUNDS

In its third Question Presented, Chrysler asks this Court to determine whether "a court may refuse to enforce an arbitration award on public policy grounds only when the award itself violates the law or requires the employer to violate the law." (Chrysler Pet. (i).)

Chrysler's argument in support of granting *certiorari* on this question is that "[t]he *courts* below thus decided in the affirmative the question expressly left open by this Court in *Misco* . . . 484 U.S. at 45 n.12." (Chrysler Pet. 28, emphasis supplied.) The only quotation presented to demonstrate that there was a holding on this question in this case, however, is from the *district court* opinion.

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purposes of evaluating a public policy argument clearly does not justify a grant of *certiorari* in this case, for two reasons.

First, contrary to Chrysler's claim, the Seventh Circuit did not ignore Chrysler's contention that it is sometimes appropriate to use after-acquired evidence to justify vacating an arbitration award as against public policy. *See* Chrysler Pet. 2 ("The Seventh Circuit simply ignored [*Misco's*] carefully drawn distinction in this case.") To the contrary, the Seventh Circuit expressly *agreed* with Chrysler's fundamental contention that under *Misco*, a "Court of Appeals [may] properly review[] established evidence that was not considered by the arbitrator in its public policy inquiry." (Pet. App. 9a n.4.) The Seventh Circuit refused to rely upon Chrysler's evidence regarding sexual harassment incidents not discovered until after the discharge because those facts were *not* "established" through the fact-finding mechanism agreed upon by the parties, the arbitral forum, not because those facts were not advanced or relied on in making the discharge in the first instance. (*Id.*)

Second, Chrysler is not able to point to any conflict or confusion in the courts of appeal on this question. To the contrary, the employer admits that the lower courts have been uniform in their interpretation of the part of *Misco* concerning the relevance of after-acquired evidence in public policy cases. (Chrysler Pet. 26-27.)

(Chrysler Pet. 25.) Nonetheless, the petition goes on to argue that the *Court of Appeals* decision here conflicts with those of the Second, Tihrd, Sixth and Eleventh Circuits in this regard. (Chrysler Pet. 25-26.)

The artful wording of Chrysler's representation notwithstanding, the Seventh Circuit opinion here expressly *declined* to rule on the question left open in *Misco* concerning the precise relationship necessary between a well-defined, dominant and explicit public policy and an arbitrator's order.

The Court of Appeals in this case did expressly note that other courts of appeals have taken a broad view of the public policy exception and have declined to enforce arbitration awards that do *not* violate positive law and do *not* require the employer to do so. (Pet. App. 8a n.3, citing *inter alia*, *Delta Airlines, Inc. v. Air Line Pilots Ass'n*, 861 F.2d 665 (11th Cir. 1988), *cert. denied*, 493 U.S. 871 (1989).)

The opinion below, however, neither approved nor disapproved those decisions. Rather, the Seventh Circuit regarded those decisions as simply inapplicable in the current context, since this case, like *Misco*, involved a violation of public policy that did not occur "while [the employees were] performing duties integral to their employment." (Pet. App. 8a n.3.) The Seventh Circuit explicitly left open the possibility that under circumstances not here present—*viz.*, "where the discharged employees' conduct violated public policies while performing duties integral to their employment and where reinstatement would have jeopardized public health or safety"—an arbitration award could be vacated although the award neither violates positive law nor requires an employer to do so. (*Id.*)

Moreover, in claiming that the decision below conflicts on the broad question left open in *Misco* with those of other courts of appeals, Chrysler mischaracterizes not

only the Seventh Circuit decision in this case, but also the decisions asserted to be in conflict.

The Sixth Circuit, in *Interstate Brands Corp. v. Teamsters Local 135*, 909 F.2d 885, 893 (6th Cir. 1990), for example, clearly did *not* decide that an arbitration award can be vacated without a showing that the award or the employer actions ordered are affirmatively illegal. Rather, *Interstate Brands* held that public policy is *not* violated by an arbitration order reinstating an individual convicted of drunk driving since "the policies of the states involved do not attempt to prohibit driving by persons . . . convicted of drunk driving . . . [unless their] licenses have been revoked." According to the Sixth Circuit, "The issue is not whether grievant's conduct for which he was disciplined violated some public policy or law, but rather whether the award requiring reinstatement . . . violated some explicit public policy." 909 F.2d at 893. *See also, Shelby Cty. Health Care Corp. v. AFSCME*, 140 LRRM 2680 (6th Cir., June 24, 1992) (citing *Interstate Brands* and holding that even where the grievance involves employment-related conduct in violation of pubilc policy, an arbitration award can be vacated only if the employer lacks discretion, under the applicable public policy, to retain or reinstate the employee in question.)

Similarly, *United Postal Service v. National Ass'n of Letter Carriers*, 839 F.2d 146 (3rd Cir. 1988), refuses to vacate an arbitration award reinstating an employee who committed physical violence against a supervisor because such "violent conduct (assuming, *arguendo*, that such a policy is properly ascertained) does not *require* [the employee's] discharge for its fulfillment." *Id.* at 149-50 (emphasis added). Like the Seventh Circuit here, the Third Circuit in *United Postal Service*, having ascertained that on the particular facts the employee's discharge was not required to vindicate public policy, declined "to reach this question of where lies the precise

boundary around our reviewing authority." 839 F.2d at 150.[7]

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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[7] The other two cases asserted to be in conflict with the Seventh Circuit's decision in this case on the ultimate standard applicable in cases seeking to void arbitration agreements on public policy grounds are *Delta Airlines*, *supra*, and *Newsday*, *supra*. *Delta Airlines*, as stated in text, was duly noted by the Seventh Circuit and distinguished, not rejected. And *Newsday* did not in terms articulate a standard applicable in public policy arbitration cases generally; as shown in Part I, *supra*, *Newsday* is, moreover, fully compatible with the decision below on the specific question of the application of the public policy exception to sexual harassment cases.

APPENDIX

ACUSTAR
A Chrysler Motors Company

CHRYSLER MARINE AND INDUSTRIAL

March 6, 1990

Ronald Gallenbeck
Route 3, Cty TK DE
Beaver Dam, Wisconsin 53916

Dear Mr. Gallenbeck:

Pursuant to the evidence uncovered during preparation for the arbitration hearing in this matter which revealed other acts of harassment on your part directed at female co-workers, the decision has been made to terminate your employment, effective immediately. However, in lieu of returning you to work only to then effect your discharge, enclosed is check 62036, in the amount of $47.20, less standard deductions, representing compensation for reinstatement for one day.

Very Truly yours,

/s/ J.G. Ihler
J.G. IHLER
Personnel Manager

cc: Dale Maas

AUG 19 1992

No. 92-38

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

CHRYSLER CORPORATION,
Petitioner,
v.

INTERNATIONAL UNION, ALLIED INDUSTRIAL WORKERS OF AMERICA, AFL-CIO; and LOCAL 793 THEREOF,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONER

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MOTION OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL FOR LEAVE TO SUBMIT BRIEF AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

To the Honorable, the Chief Justice and the Associate Justices of the United States Supreme Court:

Pursuant to Rule 37 of the Rules of this Court, the Equal Employment Advisory Council (EEAC) respectfully moves this Court for leave to file the accompanying brief *amicus curiae* in support of the Chrysler Corporation's petition for a writ of certiorari. Respondents International Union, Allied Industrial Workers of America, AFL-CIO and Local 793 thereof, have refused consent. In support of this motion, EEAC by the following shows

that its brief brings relevant matter to the attention of this Court that has not been (or will not be) presented by the parties.

1. EEAC is a voluntary association of employers organized in 1976 to promote sound approaches to the elimination of employment discrimination. Its membership includes over 250 major U.S. corporations, as well as several associations which themselves have hundreds of corporate members. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives the Council a unique depth of understanding of the practical, as well as legal considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

2. Many of EEAC's members, and the constituents of its association members, are employers subject to collective bargaining agreements and regularly use the arbitration process to settle disputes. Accordingly, EEAC members support arbitration as a means of resolving contested issues, and indeed filed an *amicus curiae* brief supporting the enforceability of arbitration agreements in *Gilmer v. Interstate/Johnson Lane Corp.*, 111 S. Ct. 1647 (1991).

3. As employers, EEAC's members or their constituents also are subject to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*, as well as other equal employment statutes and regulations. EEAC's members and member constituencies have a strong interest in maintaining workplaces that are free from sexual harassment. For this reason, EEAC members have instituted preventative measures designed to discourage sexual harassment, which include: adoption of policies expressly forbidding supervisors and employees to engage in sexually harassing conduct; publication of employee manuals and

posting of notices to inform employees of their rights; and training supervisors to recognize and halt harassment in the workplace. In addition, many members have implemented formal anti-harassment procedures whereby aggrieved employees can inform higher management authorities officially about harassing conduct in the workplace. These policies call for prompt and effective remedial action by the employer, including appropriate discipline of the offender.

4. Thus, the issues presented in the petition are extremely important to EEAC's nationwide constituency, which strongly disapproves of sexual harassment and has adopted procedures to prevent such activity. While EEAC's members firmly support the arbitration process and concur that arbitration awards generally should be insulated from judicial review, there are situations where, as here, an arbitration award may violate a well defined and dominant public policy, so that the court should refuse to enforce it. *United Paperworkers International Union v. Misco.*, 484 U.S. 29, 42 (1987). The Seventh Circuit below ruled incorrectly that the district court properly enforced an arbitration award reinstating an employee who was terminated for sexually harassing and assaulting a co-worker. Applying *Misco*, the Seventh Circuit should have ruled that the award violated the well defined and dominant public policy against sexual harassment in the workplace.

5. Because of its interest in the nation's civil rights laws, EEAC has, since its founding in 1976, filed briefs as *amicus curiae* in cases before this Court, the United States Circuit Courts of Appeals and various state supreme courts. As part of this *amicus* activity, EEAC participated as *amicus curiae* in *Stroehmann Bakeries, Inc. v. Local 776, International Brotherhood of Teamsters*, No. 91-5261 (3d Cir. June 29, 1992) in which the Third Circuit ruled that an arbitration award reinstating an accused sexual harasser violated the public policy

against sexual harassment in the workplace. EEAC has participated in a number of other cases involving sexual harassment issues, including *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986); *Kotcher v. Rosa & Sullivan Appliance Center, Inc.*, 957 F.2d 59 (2d Cir. 1992) (addressing the effect of an employer's prompt and effective response to a complaint of sexual harassment); and *Elrod v. Sears, Roebuck and Company*, 939 F.2d 1466 (11th Cir. 1992) (age discrimination claim by employee terminated for sexual harassment).

Also, EEAC has advised the Equal Employment Opportunity Commission (EEOC) on a formal and informal basis, including the filing of comments on EEOC's Interim Interpretive Guidelines on Sexual Harassment, published at 29 C.F.R. Part 1604 (1980). EEAC also has participated in other cases involving challenges to arbitration awards as violative of public policy, including *W.R. Grace and Co. v. Local Union 759*, 461 U.S. 757 (1983) (addressing EEOC conciliation agreement that conflicted with seniority provisions of collective bargaining agreement); and *Georgia Power Company v. International Brotherhood of Electrical Workers, Local Number 84*, 896 F.2d 507 (11th Cir. 1990) (arbitration award reinstating drug user overturned). Thus, EEAC has an interest in, and a familiarity with, the issues and policy concerns presented to the Court in this case.

6. EEAC seeks to assist the Court in this case by highlighting the impact its decision may have beyond the instant case in the field of employment discrimination generally. Accordingly, this brief brings relevant matter to the attention of the Court that has not already been brought to its attention by the parties. Because of its significant experience, EEAC is uniquely situated to brief this Court on the relevant concerns of the business community and the significance of this case to employers.

WHEREFORE, for the reasons stated, the Equal Employment Advisory Council respectfully requests the Court to allow it to participate as *Amicus Curiae*.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-38

CHRYSLER CORPORATION,

Petitioner,

v.

INTERNATIONAL UNION, ALLIED INDUSTRIAL WORKERS OF AMERICA, AFL-CIO; and LOCAL 793 THEREOF,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONER

The Equal Employment Advisory Council (EEAC) respectfully submits this brief *amicus curiae*, contingent on the granting of the accompanying motion for leave. The brief supports the petition for a writ of certiorari.

INTEREST OF THE *AMICUS CURIAE*

The interest of the *amicus curiae* is set forth fully in the preceding motion.

STATEMENT OF THE CASE

Chrysler Motors Corporation ("Chrysler") discharged Ronald Gallenbeck from his job as a fork lift operator after his sexual assault on a female co-worker. Pet. App.

1a.[1] Gallenbeck was using a nearby telephone as Roxanne Barstow inspected a door panel in the Beaver Dam Marine and Industrial Products facility where he worked. *Id.* at n.1. Gallenbeck put down the telephone receiver, walked up behind Barstow, "reached under her extended arms, grabbed her breasts, and squeezed them." Pet. App. 47a. "He then returned to the telephone and stated, 'Yup, they're real.'" Pet. App. 1a at n.1.

His union, Respondent herein ("the Union"), filed a grievance challenging Gallenbeck's dismissal. The collective bargaining agreement between Chrysler and the Union allowed termination of employees "for cause" and gave the arbitrator the authority to determine the meaning and application of agreement terms. Pet. App. 2a.

Although Gallenbeck admitted the incident and Chrysler presented evidence of at least four other incidents it learned of after Gallenbeck's discharge, the arbitrator ruled that Chrysler lacked just cause to terminate Gallenbeck. The arbitrator disregarded the other episodes because they were unknown to Chrysler at the time of the discharge. Asserting that while "extremely serious offenses, such as stealing or striking a foreman usually justify summary discharge . . . less serious infractions call . . . for some milder penalty," Pet. App. at 51a, the arbitrator ruled that a penalty less than termination was warranted. Pet. App. 62a. The arbitrator ordered reinstatement with a 30-day suspension. *Id.*

Chrysler brought suit under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, asking that the arbitrator's award be vacated because it violated the

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[1] Citations to the Appendix to the Petition for a Writ of Certiorari are noted as Pet. App. ——. The opinion of the Court of Appeals for the Seventh Circuit below, reported at 959 F.2d 685, is reproduced as Pet. App. 1a-11a. The opinion of the district court, reported at 748 F. Supp. 1352, is reproduced as Pet. App. 12a-43a. The arbitrator's unreported decision and award are reproduced as Pet. App. 44a-62a.

public policy against sexual harassment in the workplace. Pet. App. 2a. The union counterclaimed, seeking attorney's fees and prejudgment interest on the back pay award. On cross-motions for summary judgment, the district court affirmed the arbitration award and ordered enforcement, but denied the Union's request for fees and interest. Pet. App. 2a-3a.

Both parties appealed to the Court of Appeals for the Seventh Circuit, which affirmed the district court's decision. Chrysler has petitioned this court for a writ of certiorari.

SUMMARY OF REASONS FOR GRANTING THE WRIT

National employment policy condemns sexual harassment in the workplace. Title VII of the Civil Rights Act of 1964, guidance issued by the EEOC—the enforcement agency—and numerous decisions by the courts, as well as legislation in most states, all confirm that sexual harassment, in the workplace is a serious concern and is not to be tolerated. Accordingly, employers have a legal obligation to strive to eradicate all forms of sexual harassment and are faced with substantial liability if they fail to take prompt and effective action to resolve sexual harassment complaints. An employer's endeavors to meet and fulfill this strong public policy should be met with special deference, not indifference, by arbitrators and the courts. The decision below requiring reinstatement of a sexual harasser conflicts with the important public policy against workplace sexual harassment.

Indeed, the Seventh Circuit's holding fails to follow the clear direction of this Court in *W. R. Grace and Co. v. Local Union 759*, 461 U.S. 757 (1983), and *United Paperworkers International Union v. Misco*, 484 U.S. 29 (1987), both of which confirmed a court's authority to overturn an arbitrator's award that violates a well defined and dominant public policy ascertainable by refer-

ence to laws and legal precedent. In direct conflict with the decision below, the Second Circuit in *Newsday, Inc. v. Long Island Typographical Union. No. 915, CWA, AFL-CIO*, 915 F.2d 840 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 1314 (1991), applied *W. R. Grace* and *Misco* to find that an arbitrator's award reinstating a known sexual harasser violated the public policy against sexual harassment in the workplace. Confusion among the federal courts over the scope of a court's authority to overturn an award, and the degree of deference due the arbitrator's decision, create serious concerns for employers seeking to fulfill their obligation to eliminate sexual harassment, and should be resolved by this Court.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS' HOLDING REQUIRING REINSTATEMENT OF AN EMPLOYEE DISCHARGED FOR EGREGIOUS SEXUAL HARASSMENT CONFLICTS WITH NATIONAL EMPLOYMENT POLICY AGAINST SEXUAL HARASSMENT IN THE WORKPLACE AND THUS PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW THAT SHOULD BE DECIDED BY THIS COURT

A. National Employment Policy Condemns Sexual Harassment in the Workplace

1. *Laws and Legal Precedents Prohibit Sexual Harassment in the Workplace*

The public policy against sexual harassment in the workplace is clear and well defined. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, prohibits, *inter alia*, sex discrimination in the workplace. 42 U.S.C. § 2000e-2(a)(1).[2] As this Court has explained:

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[2] Title VII prohibits discrimination with regard to "terms, conditions, or privileges of employment" on the basis of race, color, sex, religion and national origin. 42 U.S.C. § 2000e-2(a)(1).

> Sexual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality. Surely, a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets.

Meritor Savings Bank v. Vinson, 477 U.S. 57, 67 (1986) (quoting *Henson v. Dundee*, 682 F.2d 897, 902 (11th Cir. 1982)). For this reason, sexual harassment is a form of sex discrimination prohibited by Title VII. *Vinson*, 477 U.S. at 66.

The Equal Employment Opportunity Commission (EEOC), the federal agency responsible for enforcement of Title VII, has issued guidelines that unequivocally confirm the strong public policy against sexual harassment in the workplace:

> Harassment on the basis of sex is a violation of Sec. 703 of Title VII. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

29 C.F.R. § 1604.11(a) (footnote omitted). In particular, the EEOC has highlighted conduct like Gallenbeck's as the type that would constitute a Title VII violation:

> The Commission will presume that the unwelcome, intentional touching of a charging party's intimate body areas is sufficiently offensive to alter the condi-

> tions of her working environment and constitute a violation of Title VII. More so than in the case of verbal advances or remarks, a single unwelcome physical advance can seriously poison the victim's working environment.

EEOC Policy Guidance on Current Issues of Sexual Harassment N-915-050, reprinted in *EEOC Compliance Manual* (BNA) N:4031, 4047 (March 19, 1990).

In addition, almost all states have enacted antidiscrimination laws that include prohibitions of discrimination based on sex. 5 Employment Discrimination Coordinator (WGL) ¶ 80,118 (November 13, 1990). Many have statutes specifically prohibiting sexual harassment in the workplace. *Id.* at ¶ 80,200 (May 26, 1992).

2. *Employers Are Obligated To Remedy Workplace Sexual Harassment*

Both the EEOC and the courts have imposed an affirmative obligation on employers to strive to eliminate sexual harassment in the workplace. The EEOC's guidelines make its position clear:

> Prevention is the best tool for the elimination of sexual harassment. *An employer should take all steps necessary to prevent sexual harassment from occurring*, such as affirmatively raising the subject, expressing strong disapproval, *developing appropriate sanctions*, informing employees of their right to raise and how to raise the issue of harassment under Title VII, and developing methods to sensitize all concerned.

29 C.F.R. § 1604.11(f) (emphasis added).

In *Vinson*, this Court emphasized that courts should "look to agency principles for guidance" in determining whether an employer should be held liable for sexual harassment by its employees. 477 U.S. at 72. Indeed, "absence of notice to an employer does not necessarily insulate that employer from liability." *Id.*

When the employer *has* notice of such conduct, however, it clearly has a responsibility to remedy the situation. For example, the EEOC Guidelines hold an employer responsible for sexual harassment by co-workers if the employer, including its agents or supervisors, "knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action." 29 C.F.R. § 1604.11(d).

The courts of appeals have adopted this position as well. "The prevailing trend of the case law . . . seems to hold that employers are liable for failing to remedy or prevent a hostile or offensive work environment of which management-level employees know, or in the exercise of reasonable care should have known." *Equal Employment Opportunity Commission v. Hacienda Hotel*, 881 F.2d 1504, 1515 (9th Cir. 1989) (holding employer liable because it had knowledge of sexual harassment and failed to take action).[3]

Employers who fail to take prompt, effective action to eliminate sexual harassment in the workplace are subject to significant penalties under federal and state law. *Elrod v. Sears, Roebuck and Company*, 939 F.2d 1466, 1470 (11th Cir. 1991) (in reversing jury verdict in favor of terminated sexual harasser, court noted that if company does nothing in response to complaints, it "runs a serious risk of incurring Title VII liability to those employees harassed."). Title VII in its original form provided affirmative remedies for employment discrimination, authorizing a court to "enjoin the respondent from engaging in such unlawful employment practice, and order such affirm-

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[3] *Accord Steele v. Offshore Shipbuilding, Inc.*, 867 F.2d 1311 (11th Cir. 1989) (employer took prompt action in response to complaints of hostile environment and thus not liable); *Jones v. Flagship International*, 793 F.2d 714 (5th Cir. 1986) (stating standard), *cert. denied*, 479 U.S. 1065 (1987); *Katz v. Dole*, 709 F.2d 251 (4th Cir. 1983) (stating standard). *Cf. Lipsett v. University of Puerto Rico*, 864 F.2d 881, 901 (1st Cir. 1988) (applying same standard in Title IX sexual harassment case).

ative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . or any other equitable relief as the court deems appropriate." 42 U.S.C. § 2000e-5(g). The remedies are no different when the claim is harassment. Accordingly, a court may issue an injunction against an employer found liable for harassment, and may also award back pay. *See, e.g., Hamilton v. Rodgers*, 791 F.2d 439 (5th Cir. 1986); *Zabkowicz v. West Bend Co.*, 789 F.2d 540 (7th Cir. 1986).

In addition, Title VII was amended recently to allow recovery of compensatory and punitive damages. Civil Rights Act of 1991, P.L. 102-126, § 102 (1991) (to be codified at 42 U.S.C. § 1977a). The new law permits recovery in appropriate cases of up to $300,000 if the defendant employer has more than 500 employees. *Id.* Providing a monetary remedy for sexual harassment victims was a primary motivating force behind the new damages provision. H.R. Rep. No. 40, 102d Cong., 1st Sess., pt. 1, at 66-68 (1991); H.R. Rep. No. 40, 102d Cong., 1st Sess., pt. 2, at 25-26 (1991). Eradicating sexual harassment was a serious matter for employers long before the Civil Rights Act of 1991 added a monetary damages remedy. It is even more so now that the stakes are higher.

Moreover, employers may face class actions for hostile environment sexual harassment. In *Jenson v. Evelyth Taconite Company*, 139 F.R.D. 657 (D. Minn. 1991), a class of approximately 100 women was certified in the first sexual harassment class action in history. Ellen Joan Pollock, *Judge Approves First Sex-Bias Class Action*, Wall St. J., December 18, 1991 at B1. The case involves allegations of sexually explicit graffiti and posters as well as physical abuse, "kissing, pinching, and grabbing." 139 F.R.D. at 663.

In addition, state fair employment practices laws contain remedial provisions comparable to Title VII. Some provide only for "make-whole" remedies such as rein-

statement and backpay, while others allow recovery of compensatory and/or punitive damages. *See generally* 5 Employment Discrimination Coordinator (WGL) ¶¶ 80,118 (prohibition of sex discrimination); 80,200 (sexual harassment); 80,236 (damages).

Further, employees who experience harassment on the job may have a cause of action under state tort law. For example, in *Baker v. Weyerhaeuser Co.*, 903 F.2d 1342 (10th Cir. 1990), the Tenth Circuit recently upheld a jury verdict of $45,000 in actual damages and $45,000 in punitive damages on a pendent state claim of intentional infliction of emotional distress raised as part of a Title VII sexual harassment claim.

Thus, employers who fail to respond promptly and effectively to complaints of sexual harassment face enormous potential liability under both federal and state law.

3. *Because of the Strong Public Policy Condemning Sexual Harassment, An Employer's Decision To Discharge an Employee for Sexual Harassment Should Be Accorded a Special Degree of Deference*

Sexual harassment in the workplace is no less reprehensible when the perpetrator is a member of a union. Nevertheless, if the arbitration award in the instant case is allowed to stand, employers who attempt in good faith to eliminate unlawful sexual harassment in the workplace will be placed in a dilemma when the offending employee is a member of a union.

Under these circumstances, the employer's only legitimate choice is to take effective action to halt the harassment, and let the chips fall where they may. Unfortunately, as here, the employer's reward for its commendable endeavor may be lengthy and costly litigation, and at worst, an arbitration award reinstating the harasser with back pay.

In order for anti-harassment policies and programs to be effective, employers need some assurance that their

legitimate, nondiscriminatory efforts will be given credence by arbitrators. The opinion of the arbitrator here gives lip service to the important issue of sexual harassment in the workplace, then clearly relegates the issue to second class status. The arbitrator did observe that "[s]exual harassment in the workplace is of serious concern to employers, employees, and unions . . . ." Pet. App. 51a. Nevertheless, he pointed to "extremely serious offenses, such as stealing or striking a foreman" as justifying "summary discharge without the necessity of prior warnings or attempts at corrective discipline," while "[l]ess serious infractions call not for discharge for the first offense but for some milder penalty aimed at correction." *Id.*

By categorizing an incident where an employee walks up behind a female co-worker and grasps her breasts as a "less serious infraction" in comparison to stealing or striking a supervisor, the arbitrator sends a clear message that unwelcome physical, sexual contact is not a serious matter. Unlike the EEOC's characterization of such contact as something that would "seriously poison" the working environment, in this arbitrator's opinion it is less heinous than stealing company property.

The arbitrator's apparent indifference to the seriousness of Gallenbeck's offense, the impact on Gallenbeck's victim, and the important policy at stake, jeopardizes the efforts of Chrysler and other employers to eradicate sexual harassment from workplaces in this country. One of the most difficult problems of maintaining an effective anti-harassment program is convincing potential victims and perpetrators that the company takes harassment seriously and will not tolerate it. Communicating this point is critical to the success of the program. Treating a highly offensive personal assault such as grabbing a woman's breasts as a minor incident undermines any company's efforts to garner acceptance for its anti-harassment program.

To assist in increasing the effectiveness of anti-harassment programs, the courts should give special deference to

an employer's decision to discharge an employee for sexual harassment. As the arbitrator below noted, some offenses are indeed serious enough to warrant discharge. As he failed to discern, some sexual harassment offenses fall into this category. While progressive discipline may be appropriate for lesser offenses, an employer's decision that particular conduct merits termination should receive a substantial degree of deference from arbitrators and the courts.

Some federal courts have strongly endorsed employer discipline of employees who harass others, and dismissed a variety of charges challenging such action.[4] For example, the Eleventh Circuit recently overturned a jury verdict on an age discrimination claim by an accused harasser because the company's honest belief that the harassment occurred formed the legitimate, nondiscriminatory reason for his discharge. *Elrod v. Sears, Roebuck and Company*, 939 F.2d 1466 (11th Cir. 1991). As one district court has said, "It should be clear to corporate America, by now, that the law does not tolerate the type of behavior [the plaintiff] exhibited. The termination of employees who behave as [the plaintiff] did is justified and lawful. In fact, the only troublesome part of this case is that it took [the defendant employer] as long as it did to fire [the plaintiff]." *Anderson v. Hewlett-Packard Corp.*, 694 F. Supp. 1294, 1304 (N.D. Ohio 1988) (ruling in favor of the defendant in a suit by a discharged employee for breach of contract and promissory estoppel).

Likewise, "[a]n employer is not required to tolerate the disruption and inefficiencies caused by a hostile workplace environment until the wrongdoer has so clearly violated the law that the victims are sure to prevail in a Title VII action." *Carosella v. United States Postal Service*, 816 F.2d 638, 643 (Fed. Cir. 1987). In *Johnson v.*

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[4] *See, e.g., Newsday, Inc. v. Long Island Typographical Union, No. 915, CWA, AFL-CIO*, 915 F.2d 840 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 1314 (1991) (overturning arbitration award reinstating sexual harasser), discussed in detail *infra*.

Perkins Restaurants, Inc., 815 F.2d 1220 (8th Cir. 1987), the Eighth Circuit upheld the lower court's dismissal of the ADEA claim of a service technician who was fired almost instantly for kissing a sixteen-year-old waitress. The court accepted the employer's reason that Johnson was discharged for violating explicit company policy against sexual harassment and supported the employer's decision even though company policy required progressive discipline where appropriate.

Courts in other types of suits have given a heightened degree of credence to the employer's defense that it was acting in response to sexual harassment. For example, in a recent wrongful discharge case where a foreman was discharged for sexual harassment, the Tenth Circuit found the public policy opposing sexual harassment relevant to contract law, stating:

> Public policy also affects our construction of this contract claim. Here, public policy operates to require a construction of contract terms in favor of giving the employer broad discretion in its efforts to eliminate sexual harassment from the workplace. In this area of judicially created contracts and contract rights, it is perfectly consistent to impose a rule of contract construction which favors the enforcement of a workplace free from offensive sexual conduct.

Williams v. Maremont Corporation, 875 F.2d 1476, 1485 (10th Cir. 1989).

Similarly, the Fifth Circuit has held that the public policy against sexual harassment supports a qualified privilege, and a presumption of good faith, overcoming a claim for libel and slander arising out of a management bulletin published after an employee was discharged for sexual harassment. *Garziano v. E.I. Du Pont De Nemours & Co.*, 818 F.2d 380 (5th Cir. 1987). *Accord Stockley v. AT & T Information Systems, Ins.*, 687 F. Supp. 764, 769 (E.D.N.Y. 1988) ("communications made in connection with *bona fide* Title VII investigations are protected by

a qualified privilege" in a defamation suit by an offending employee).[5]

An employer who responds swiftly and effectively, yet fairly, to allegations of sexual harassment should not have to act at its peril when it discharges the offending employee. The employer's decision to terminate a known sexual harasser is more than a simple business decision. The employer's actions further sound public policy, in addition to meeting a significant legal obligation placed on employers by Congress and the courts to protect the rights of innocent victims. If an employer's investigation produces a good faith belief that unlawful conduct has occurred, and the employer determines that discharge is the appropriate remedy, that decision should be given special deference when it is later challenged in a grievance under a collective bargaining agreement. Therefore, EEAC urges the Court to grant the petition and use this case as the vehicle for establishing such a policy.

II. THE COURT OF APPEALS' HOLDING FAILS TO FOLLOW THIS COURT'S DECISIONS IN *W.R. GRACE* AND *MISCO*, AND CONFLICTS DIRECTLY WITH THE SECOND CIRCUIT'S DECISION IN *NEWSDAY v. LONG ISLAND TYPOGRAPHICAL UNION*, CREATING SERIOUS CONFUSION FOR EMPLOYERS

A. Under *W. R. Grace* and *Misco*, a Court May Vacate an Arbitrator's Award That Violates an Explicit, Well Defined and Dominant Public Policy that the Court Ascertains by Reference to the Laws and Legal Precedents

A district court's role in reviewing an arbitration award is limited. This makes sense "[b]ecause the par-

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[5] The court adopted the position advocated by the EEOC as *amicus curiae*. *Brief of the Equal Employment Opportunity Commission as Amicus Curiae In Support of Defendant's Motion For Summary Judgment, Stockley v. AT & T Information Systems, Inc.*, No. 86 Civ. 1643 (RJD) (E.D.N.Y.).

ties have contracted to have disputes settled by an arbitrator chosen by them rather than by a judge, [and] it is the arbitrator's view of the facts and of the meaning of the contract that they have agreed to accept." *United Paperworkers International Union v. Misco, Inc.*, 484 U.S. 29, 37-38 (1987). Similarly, courts must give great deference to the arbitrator's interpretation of the contract. As this Court stated in *Misco*, "[t]he arbitrator may not ignore the plain language of the contract; but the parties having authorized the arbitrator to give meaning to the language of the agreement, a court should not reject an award on the ground that the arbitrator misread the contract." *Id.* at 38.

Nevertheless, a court is prohibited from enforcing a bargaining agreement that is "contrary to public policy." *Id.* at 42 (citing *W. R. Grace and Co. v. Rubber Workers*, 461 U.S. 757, 766 (1983)). As the Court noted in *Misco* and *W. R. Grace*, such a doctrine derives from the more general legal doctrine that a court must not enforce contracts that violate the law or some other policy. A district court may refuse to enforce an arbitrator's interpretation of a contract as long as such a refusal to enforce is:

> limited to situations where the contract as interpreted would violate "some explicit public policy" that is "well defined and dominant, and is to be ascertained 'by reference to the laws and legal precedents and not from general considerations of supposed public interests.' "

Misco, 484 U.S. at 43 (quoting *W.R. Grace*, 461 U.S. at 766). Indeed, it should be noted that the question of whether such a public policy exists is " 'ultimately one for resolution by the courts.' " *Id.*

As shown above, the public policy against sexual harassment in the workplace is undeniably "well defined and dominant," and is ascertainable from laws such as Title VII of the Civil Rights Act of 1964 and legal precedents

thereunder, including this court's decision in *Meritor Savings Bank v. Vinson* and numerous decisions of the courts of appeals. *See, e.g., Stroehmann Bakeries, Inc. v. Local 776, International Brotherhood of Teamsters*, No. 91-5261, slip op. at 14 (3d Cir. June 29, 1992) ("under the circumstances present here, an award which fully reinstates an employee accused of sexual harassment without a determination that the harassment did not occur violates public policy."). The decision below thus conflicts with this well established policy.

B. The Decision Below Conflicts With the Second Circuit's Decision in *Newsday*

1. *In Contrast to the Court Below, the Second Circuit Ruled in* Newsday *that Reinstatement of an Employee Who Commits a Serious Sexual Harassment Offense Violates Public Policy*

In *Newsday, Inc. v. Long Island Typographical Union, No. 915, CWA, AFL-CIO*, 915 F.2d 840 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 1314 (1991), a case substantially similar to this one, the Second Circuit affirmed the district court's decision holding that an arbitrator's award that ordered reinstatement of an employee discharged for sexual harassment violated public policy.[6] Finding that the arbitrator's award "completely disregarded the public policy against sexual harassment in the workplace" and indeed "condones" sexual harassment, the Second Circuit concluded that the award "tends to perpetuate a hostile, intimidating and offensive work environment . . . [and] prevents Newsday from carrying out its legal duty to elim-

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[6] Significantly, the EEOC filed an *amicus* brief in *Newsday* supporting the district court's ruling. *Brief of the Equal Employment Opportunity Commission As Amicus Curiae, Newsday, Inc. v. Long Island Typographical Union No. 915, CWA, AFL-CIO*, No. 90-7236 (2d Cir.).

inate sexual harassment in the work place." 915 F.2d at 845.[7]

By upholding the reinstatement of an employee who had made repeated physical sexual assaults on his co-workers, the decision below conflicts directly with the Second Circuit's *Newsday* decision. In so doing, the decision below actually sidestepped the issue. After observing that "[t]he public policy doctrine allows this court to decide *de novo* whether the arbitrator's reinstatement of Gallenbeck violates public policy," Pet. App. 4a, and that "[t]he public policy against sexual harassment in the work place is well-recognized," *id.*, the Seventh Circuit inexplicably retreated to the conclusion that "[w]hile we do not condone Gallenbeck's behavior, it was within

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[7] The reasoning of the Second Circuit in *Newsday* is consistent with decisions of other circuits in cases involving employees who engaged in illegal activities as part of their performance of their employment duties and thereby posed a threat to others. In *Delta Air Lines v. Air Line Pilots Association, International*, 861 F.2d 665 (11th Cir. 1988), *cert. denied*, 110 S. Ct. 201 (1989), the Eleventh Circuit vacated an arbitration award ordering reinstatement of a pilot who operated a passenger aircraft while under the influence of alcohol. In *Georgia Power Company v. International Brotherhood of Eiectrical Workers, Local Number 84*, 707 F. Supp. 531 (N.D. Ga. 1989), *aff'd per curiam* 896 F.2d 507 (11th Cir. 1990), the Eleventh Circuit vacated an arbitrator's award ordering reinstatement of an employee in a safety-sensitive position after he was discharged following a drug test that confirmed heavy marijuana use. *See also Iowa Electric Light and Power Company v. Local Union 204 of the International Brotherhood of Electrical Workers (AFL-CIO)*, 834 F.2d 1424 (8th Cir. 1987) (upholding district court's order vacating an arbitration award reinstating a nuclear power plant employee who was discharged for deliberately violating federal regulations on containment of nuclear materials, due to strong public policy favoring strict adherence to nuclear safety rules); *Amalgamated Meat Cutters and Butcher Workmen of North America AFL-CIO, Local Union 540 v. Great Western Food Company*, 712 F.2d 122 (5th Cir. 1983) (arbitration award reinstating trucker who drank alcohol on duty violated public policy, considering effect on public health and safety as well as potential liability of employer for employee's actions).

the purview of the collective bargaining agreement and public policy for the arbitrator to order his reinstatement." Pet. App. 8a.

The Seventh Circuit tied its conclusion to the arbitrator's authority to craft an appropriate remedy. Pet. App. 6a-7a. However, this approach evades the court's own statement that it is to decide the public policy issue *de novo*. The issue is not whether the arbitrator had the authority to reduce the discipline meted out to Gallenbeck for his offense, but whether the arbitrator's decision, once made, violates the strong public policy against workplace sexual harassment.

2. *The Seventh Circuit Should Have Considered After-acquired Evidence in Making the Public Policy Determination*

That the court below, like the arbitrator, ignored evidence of Gallenbeck's prior offenses typifies the lower court's avoidance of its obligation to decide the public policy issue *de novo*. While the arbitrator may have had the authority to focus solely on the single incident known at the time of discharge to determine whether Chrysler had just cause, both the arbitrator and the Seventh Circuit should have taken the other incidents into consideration in determining whether Gallenbeck should have been returned to the Chrysler workforce.

Indeed, the Seventh Circuit's refusal to consider the additional evidence as part of its public policy determination conflicts directly with this Court's direction in *Misco*. While this Court in *Misco* reversed the Court of Appeals' decision for lack of an adequate formulation of public policy, it observed that "[i]n pursuing its public policy inquiry, the Court of Appeals quite properly considered" facts that were established in testimony but that were not considered by the arbitrator because they were not part of the basis of the termination decision. 484 U.S. at 44.

It is well recognized in the employment discrimination context that evidence that may not be relevant in determining whether there was just cause for termination may be quite relevant for other purposes, such as shaping the appropriate final outcome. Information discovered after an adverse employment decision is made cannot form the basis for that decision, but may affect the remedy available to the employee challenging the decision. *See, e.g., Summers v. State Farm Mutual Automobile Insurance Company*, 864 F.2d 700 (10th Cir. 1988) (after-acquired evidence that employee falsified documents bars relief for age discrimination claimant challenging termination); *Johnson v. Honeywell Information Systems*, 955 F.2d 409 (6th Cir. 1992) (misrepresentations on employment application discovered after termination barred relief on wrongful discharge and retaliation claims under Michigan law). Thus, the court below erred seriously in affirming the arbitrator's refusal to consider clearly relevant evidence.

C. The Unclear Directions Offered by the Courts of Appeals Create Serious Confusion for Employers that Should Be Resolved by this Court

As noted, the decision below conflicts directly with the Second Circuit's *Newsday* decision. Two other court of appeals' decisions on similar facts only add to the confusion. In *Communication Workers of America v. Southeastern Electric Cooperative of Durant, Oklahoma*, 882 F.2d 467 (10th Cir. 1989), the Tenth Circuit upheld an arbitrator's decision reinstating a long-term employee who had been discharged after a customer reported that he sexually assaulted her. The court appeared to defer to the arbitrator's choice of remedy, noting that it was a first offense and that the employee was contrite. 882 F.2d at 470. In *Stroehmann Bakeries v. Local 776, International Brotherhood of Teamsters*, No. 91-5261 (3d Cir. June 29, 1991), the Third Circuit overturned an arbitrator's award reinstating a delivery truck driver accused

of physically harassing a customer's young female night clerk because the arbitrator never made a determination that the harassment did not occur. The Third Circuit reasoned that the *Communications Workers* decision actually supported its conclusion, stating that "*Communitions Workers* does not stand for the proposition that objectively unwelcome sexual advances can be ignored by a labor arbitrator. The Tenth Circuit merely deferred to the arbitrator's choice of remedy." *Id.* (slip op. at 16).

The problem with this analysis is that it is the remedy itself—reinstatement of a known sexual harasser—that violates the well defined and dominant public policy against sexual harassment in the workplace. The difference between termination and a 30-day suspension is not merely a difference in degree of penalty, of interest only to the individual grievant. In the public policy context, the difference between termination and suspension is the difference between eliminating a known sexual harasser from the workforce and returning him to the scene of his misdeeds, perhaps to harass again.

Accordingly, employers who receive complaints of sexual harassment or sexual assault of a type that would warrant termination are left with no clear direction. They know there is a strong public policy against sexual harassment. They know also that they face severe sanctions if they know that sexual harassment has occurred and yet fail to take effective action. Nevertheless, the courts of appeals differ greatly on whether the employer's reasoned decision to uphold this public policy will be given proper consideration by the arbitrator.

Thus, EEAC urges the Court to grant the petition and recognize the strong public policy against workplace sexual harassment. Using this case as the vehicle, the Court should establish guidelines and rule that the employer's determination should be given special deference by an arbitrator.

CONCLUSION

For the foregoing reasons, EEAC respectfully submits that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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No. 92-38

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

CHRYSLER CORPORATION,

Petitioner,

v.

INTERNATIONAL UNION, ALLIED INDUSTRIAL WORKERS OF AMERICA, AFL-CIO, AND LOCAL 793 THEREOF,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE and BRIEF AMICUS CURIAE OF THE FLORIDA ASSOCIATION FOR WOMEN LAWYERS, NOW LEGAL DEFENSE AND EDUCATION FUND, CENTER FOR WOMEN POLICY STUDIES, AND CENTER FOR CONSTITUTIONAL RIGHTS IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to rule 37.2 of the Rules of this Court, the Florida Association for Women Lawyers, NOW Legal Defense and Education Fund, Center for Women Policy Studies, and Center for Constitutional Rights respectfully move for leave to file the attached brief amicus curiae. Counsel for petitioner has granted consent to file, and the letter expressing said consent is on file with the Clerk of this Court. Counsel for respondents has refused consent to file.

Florida Association for Women Lawyers ("FAWL") is a bar association formed in 1951. Its objectives are to pro-

mote women's rights and the common interests of women lawyers, to advance the science of jurisprudence, to promote reform in the law, to facilitate the administration of justice, and to uphold the highest standard of integrity, learning, honor and courtesy in the legal profession.

FAWL and its local chapters focus upon the professional advancement of women lawyers and the promotion of women's rights generally. FAWL was instrumental in convincing the Florida Supreme Court to appoint a Gender Bias Study Commission to determine in what areas of our legal society bias based on gender exists. The result of two years of hearings and study was a report concluding that "although some may ignore its existence, gender bias permeates Florida's legal system today."

FAWL's members have a strong interest in stopping sexual harassment. Sexual harassment is one of the most widespread problems faced by women in the work force. Its detrimental effect upon the mental and physical health of women workers, as well as their ability to advance in their chosen careers, has been well-documented.

NOW Legal Defense and Education Fund ("NOW LDEF") is a leading national non-profit civil rights organization that performs a broad range of legal and educational services in support of women's efforts to eliminate sex-based discrimination and secure equal rights. NOW LDEF was founded in 1970 by leaders of the National Organization for Women. Eliminating sexual harassment in the workplace is a major focus of NOW LDEF's efforts. NOW LDEF attorneys have presented testimony concerning sexual harassment before the Subcommittee on Employment Opportunities of the House Committee on Education and Labor, U.S. Congress, litigated several sexual harassment cases, including *Robinson v. Jacksonville Shipyards, Inc.*, 760 F.Supp. 1486 (M.D. Fla. 1991),

appeal docketed (11th Cir. July 3, 1991), and coordinated all the amicus briefs filed in *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986). NOW LDEF also drafted an amicus brief on behalf of the employer in *Newsday, Inc. v. Long Island Typographical Union*, 915 F.2d 840 (2d Cir. 1990), *cert. denied*, 111 S.Ct. 1314 (1992), on the same issues presented by this case.

The Center for Women Policy Studies was founded in 1972 as the first national policy research and advocacy institute focused exclusively on issues of social and economic justice for women. The Center has published materials on sexual harassment and violence against women. Our current work focuses on defining violence against women (like acts of violence based on race, ethnicity, national origin, religion, and sexual identity) as not random, isolated crimes against persons who happen to be female. Rather these crimes against individuals are meant to intimidate and terrorize the larger group or class of people—women.

The Center for Constitutional Rights ("CCR") is a litigation/education organization located in New York and Mississippi which was founded in 1966. Born of the civil rights movement and the struggles of Black people in the United States for true equality, CCR has litigated for voting rights, civil rights, and rights protected by international law.

CCR is of the view that the decision of the Seventh Circuit affirming the decision of the arbitrator to reinstate an employee who has repeatedly engaged in sexual harassment must be reversed. The Seventh Circuit decision is in conflict with similar cases decided by other circuits and violates the well-defined public policy against sexual harassment at the workplace.

The attached brief amicus curiae addresses the public policy issues raised by the court of appeals' ruling and its impact on the victims of sexual harassment.

Respectfully submitted.

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INTEREST OF THE AMICI CURIAE

Florida Association for Women Lawyers ("FAWL") is a bar association with over 2,000 members whose objectives include the promotion of women's rights. FAWL was instrumental in convincing the Florida Supreme Court to appoint a Gender Bias Study Commission to determine in what areas of our legal society bias based on gender exists. The result of two years of hearings and study was

a report concluding that "although some may ignore its existence, gender bias permeates Florida's legal system today."

The members of FAWL have a strong interest in stopping sexual harassment of women in the workplace. Sexual harassment is one of the most widespread problems faced by women in the work force. Its detrimental effect upon the mental and physical health of women workers, as well as their ability to advance in their chosen careers, has been well-documented. The court of appeals' ruling frustrates the ability of employers to protect women from sexual harassment and provides further disincentive for women to report incidents of sexual harassment in the workplace.

NOW Legal Defense and Education Fund ("NOW LDEF") is a leading national non-profit civil rights organization that performs a broad range of legal and educational services in support of women's efforts to eliminate sex-based discrimination and secure equal rights. NOW LDEF was founded in 1970 by leaders of the National Organization for Women. Eliminating sexual harassment in the workplace is a major focus of NOW LDEF's efforts. NOW LDEF attorneys have presented testimony concerning sexual harassment before the Subcommittee on Employment Opportunities of the House Committee on Education and Labor, U.S. Congress, litigated several sexual harassment cases, including *Robinson v. Jacksonville Shipyards, Inc.*, 760 F.Supp. 1486 (M.D. Fla. 1991), *appeal docketed* (11th Cir. July 3, 1991), and coordinated all the amicus briefs filed in *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986). NOW LDEF also drafted an amicus brief on behalf of the employer in *Newsday, Inc. v. Long Island Typographical Union*, 915 F.2d 840 (2d Cir. 1990),

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CCR is of the view that the decision of the Seventh Circuit affirming the decision of the arbitrator to reinstate an employee who has repeatedly engaged in sexual harassment must be reversed. The Seventh Circuit decision is in conflict with similar cases decided by other circuits and violates the well-defined public policy against sexual harassment at the workplace.

REASONS FOR GRANTING PETITION

I.

THE DECISION OF THE SEVENTH CIRCUIT IN THIS CASE UPHOLDING THE REINSTATEMENT OF A CHRONIC SEXUAL HARASSER CONFLICTS WITH DECISIONS OF THE SECOND AND THIRD CIRCUITS THAT AFFORD WOMEN WORKERS GREATER PROTECTION.

The decision of the court of appeals in this case permits an arbitrator to obstruct the well-defined dominant public policy against sexual harassment in the workplace. The decision conflicts with decisions of the courts of appeals in the Second and Third Circuits. The ability of employers to provide a work environment free from discriminatory intimidation, ridicule, and insult hangs in the balance. It is of vital importance to working women, particularly those in non-traditional areas, to be assured that known sexual harassers will not be tolerated in the workplace.

The conflict with *Newsday, Inc. v. Long Island Typographical Union*, 915 F.2d 840 (2d Cir. 1990), *cert. denied*, 111 S.Ct. 1314 (1991) is cogently set forth in petitioner's brief. The Third Circuit has also recently disapproved the reinstatement of a sexual harasser on public policy grounds. In *Stroehmann Bakeries, Inc. v. International Brotherhood of Teamsters*, No. 91-5261 (3d Cir. June 29, 1992), 1992 WL 150962, the arbitrator's reinstatement of an employee discharged for sexual harassment was based on his conclusion that the employer had not sufficiently investigated the alleged incident before discharging the employee. The arbitrator made no determination regarding the merits of the sexual harassment allegation. The Third Circuit held that the arbitrator's award reinstating an employee accused of sexual harassment without a determination regarding the merits of the allegation violates well-established and dominant public policies concerning sexual

harassment in the workplace. In addition to the "dominant public policy against sexual harassment in the workplace," the Third Circuit also noted "a well-defined dominant public policy favoring voluntary employer prevention and application of sanctions against sexual harassment in the workplace," as recognized by this Court in *W.R. Grace & Co. v. Rubber Workers*, 461 U.S. 757, 770 (1983) and *Paperworkers v. Misco, Inc.*, 484 U.S. 29 (1987).[1] 1992 WL 150962, at *6. The Third Circuit concluded:

> [The arbitrator's] award would allow a person who may have committed sexual harassment to continue in the workplace without a determination of whether sexual harassment occurred. Certainly, it does not discourage sexual harassment. Instead, it undermines the employer's ability to fulfill its obligation to prevent and sanction sexual harassment in the workplace. For these reasons, we conclude that reinstatement of this employee without a determination of the merits of the allegation violates public policy.

Id.

The union in *Stroehmann* unsuccessfully presented an argument similar to that successfully relied upon by the union herein, *viz.* that the court cannot vacate a labor arbitration award unless the award itself, not just the means

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[1] Petitioner Chrysler's position in this case is fully consistent with this concern that the public policy against workplace sexual harassment be achieved through "voluntary employer prevention," and the "application of sanctions" that the employer concludes are appropriate in light of all the circumstances. The strong public policy against sexual harassment in the workplace would not *require* dismissal of every sexual harasser. But the Seventh Circuit's decision in this case deprives an employer of its most powerful sanction, dismissal. An employer must be free to determine that dismissal of a sexual harasser is an appropriate way to fulfill its legal duties under Title VII and to protect its women employees.

of arriving at it, violates public policy. The Third Circuit held that the award itself violated public policy because "an award of full reinstatement without findings on what [grievant] did violates the strong public policy" against sexual harassment in the workplace. 1992 WL 150962, at *8. More assuredly, in this case, the reinstatement of Gallenbeck, a known chronic sexual harasser, violates the strong public policy against sexual harassment in the workplace.

Article IX of Chrysler's collective-bargaining agreement with the union provides that Chrysler has the right to discharge for "proper cause." The arbitrator correctly stated that "the degree of discipline imposed must reasonably relate to the seriousness of the employee's proved offense and the record of the employee in his service with the Employer." It is the arbitrator's unsubstantiated denigration of the seriousness of the particular incident at issue in this case that offends the well-defined public policy of this Nation against sexual harassment. The arbitrator conceded that "extremely serious offenses, such as stealing or striking a foreman" justify summary discharge without the necessity of prior warnings or attempts at corrective discipline. The arbitrator opined, however, that "arbitral thought" does not support "the proposition that sexual harassment is such an extremely serious offense that rehabilitation is no longer a concern so that it usually justifies summary discharge without the necessity of prior warnings or attempts at corrective discipline." Pet. App. 61a. This statement is directly at odds with the clear public policy against sexual harassment. The EEOC places particular importance on unwelcome, intentional touching of "intimate body areas" altering the conditions of the working environment. "More so than in the case of verbal advances or remarks, a single unwelcome

physical advance can seriously poison the victim's working environment." *EEOC Policy Guidance on Sexual Harassment*, 8 Fair Emp. Prac. Man. (BNA) 405:6691 (March 19, 1990).

Gallenbeck's actions in this case were not an instance of unreturned love or behavior which might have been appropriate outside the work environment. It does not require some fine balancing of circumstances of place and time and personalities involved to determine the impropriety of Gallenbeck's behavior. Slight nuances of proper workplace etiquette are not involved here. This was an intentional, malicious sexual assault designed to embarrass and humiliate the victim because of her sex.

II.

THE REINSTATEMENT OF A KNOWN AND CHRONIC SEXUAL HARASSER SORELY DENIGRATES WORKING WOMEN AND DETERS THEM FROM REPORTING INCIDENTS OF SEXUAL HARASSMENT.

The impact on women in the workplace of sexual harassers such as Gallenbeck has been documented extensively in recent years. Based on testimony of expert witnesses, the court in *Robinson v. Jacksonville Shipyards, Inc.*, 760 F.Supp. 1486 (M.D. Fla. 1991) found:

> "when sex comes into the workplace women are profoundly affected . . . in their job performance and in their ability to do their jobs without being bothered by it." The effects encompass emotional upset, reduced job satisfaction, the deterrence of women from seeking jobs or promotions, and an increase of women quitting jobs, getting transferred, or being fired because of the sexualization of the workplace.

Id. at 1505 (citations omitted). The court noted that it is established that "victims of sexual harassment suffer

stress effects," and that "stress as a result of sexual harassment is recognized as a specific, diagnosable problem by the American Psychiatric Association." *Id.* at 1506. Relying on a study by the Working Women's Institute finding that "ninety-six percent of sexual harassment victims experienced emotional stress, forty-five percent suffered work performance stress, and thirty-five percent were inflicted with physical stress problems," *id.* at 1507, the court succinctly summarized the devastating effect that reinstating a sexual harasser could be expected to have on working women:

> Sexual harassment has a cumulative, eroding effect on the victim's well-being. When women feel a need to maintain vigilance against the next incident of harassment, the stress is increased tremendously. When women feel that their individual complaints will not change the work environment materially, the ensuing sense of despair further compounds the stress.

Id. at 1507.[2]

Sexual harassment in the workplace has serious psychological, physical and economic consequences. The Working Women's Institute study, referenced in *Robinson*, *supra*, also found that 90% of sexual harassment victims surveyed experienced nervousness, fear and anger and 63% experienced nausea, headaches, and tiredness. Matthew C. Hesse and Lester J. Hubble, Note, *The Dehumanizing Puzzle of Sexual Harassment: A Survey of The Law*

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[2] The court explained that stress effects suffered from sexual harassment include work performance stress, such as "distraction from tasks, dread of work, and an inability to work," emotional stress, covering a range of responses including "anger, fear of physical safety, anxiety, depression, guilt, humiliation, and embarrassment," and "physical stress," which may manifest itself as "sleeping problems, headaches, weight changes, and other physical ailments." *Id.* at 1506.

Concerning Harassment of Women in the Workplace, 24 Washburn L.J. 574, 575 (1985). "All sexual harassment is a stressful experience . . . [T]he victim is violated either physically or psychologically and experiences a loss of autonomy and control." Lin Farley, *Sexual Shakedown* 17 (1979). The common psychological consequences of sexual harassment are "feelings of powerlessness, fear, anger, nervousness, decreased job satisfaction and diminished ambition." *Sexual Discrimination in the Workplace, 1981: Hearings Before Senate Committee on Labor and Human Resources*, 97th Cong., 1st Sess. 524 (1981) (hereinafter *Hearings*) (statement of Karen Sauvigné, Program Director, Working Women's Institute). The effects of sexual harassment frequently include headaches, backaches, nausea, weight loss or gain, insomnia, depression and nervousness. *Hearings, supra*, at 524; *Sexual Harassment in the Federal Government, Hearings before the Subcomm. on Investigations of the House Comm. on Post Office and Civil Service*, 96th Cong., 1st Sess. 28 (1979) (statement of Jan Laventer, Women's Justice Center); Carroll M. Brodsky, *The Harassed Worker* 40 (1976); Jill Laurie Goodman, *Sexual Harassment: Some Observations on the Distance Travelled and the Distance Yet To Go*, 10 Cap. U. L. Rev. 445, 456 (1981).

In *Zabkowicz v. West Bend Co.*, 589 F.Supp. 780 (E.D. Wis. 1984), for example, there was testimony from two treating physicians that the sexual harassment victim in that case was "anxious and subject to crying spells" and suffered "diarrhea, vomiting, severe nausea, and cramping," diagnosed as "psychophysiological gastro-intestinal disease due to harassment at work." *Id.* at 783. The victim in that case had taken two medical leaves of absence as a result of sexual harassment in her workplace, lasting a total of almost two months of a three month period.

Loss of motivation, absenteeism, and diminished productivity are the certain by-products of women's loss of desire and ability to work efficiently in the face of hostile and harassing sexual confrontations in the workplace. The 1986 study conducted by the United States Merit Systems Protection Board estimated that lower job productivity, higher turnover, and increased absenteeism as a result of sexual harassment costs federal government employers more than $130 million annually. Merit Systems Protection Board, *Sexual Harassment in the Federal Government: An Update* 40 (1988) (hereinafter *MSPB Study*). This does not include the costs of litigating sexual harassment claims, nor does it include any figure for the established mental, physical, and frequently economic injury suffered by victims of sexual harassment in the workplace. "Victims pay all the intangible costs inflicted by anger, humiliation, frustration, withdrawal, dysfunction in family life, or other damage that can be sexual harassment's aftermath." *Id.* at 41. Women often quit jobs, request transfers, refuse promotions and training, take paid and unpaid time off, and develop negative attitudes leading to poor job performance, as a result of sexual harassment in the workplace. Wendy Pollack, *Sexual Harassment: Women's Experience vs. Legal Definitions*, 13 Harv. Women's L.J. 46, 51 (1990). "Women may take themselves out of the work force altogether if they cannot be assured of a safe work environment." *Id.*

With one broad sweep the arbitrator in this case has eradicated years of gains in the recognition of sexual harassment as an extremely serious offense. As noted by the Florida Supreme Court in *Byrd v. Richardson-Greenshields Securities*, 552 So.2d 1099 (Fla. 1989):

> There can be no doubt at this point in time that both the state of Florida and the federal government have

> committed themselves strongly to outlawing and eliminating sexual discrimination in the workplace, including the related evil of sexual harassment. The statutes, case law, and administrative regulations uniformly and without exception condemn sexual harassment in the strongest possible terms.

Id. at 1102.

In *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), this Court noted the EEOC precedent holding that "Title VII affords employees the right to work in an environment free from discriminatory intimidation, ridicule and insult." *Id.* at 65. In *Rogers v. Equal Employment Opportunity Commission*, 454 F.2d 234 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972), the Fifth Circuit acknowledged that some discriminatory working environments may "destroy completely the emotional and psychological stability of minority group workers." *Id.* at 238. Sexual harassment can have that effect. As the Eleventh Circuit has explained:

> Sexual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality. Surely, a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets.

Henson v. Dundee, 682 F.2d 897, 902 (11th Cir. 1982).

Even a single workplace sexual assault is a serious matter. But by ignoring the evidence of other incidents of sexual harassment by Gallenbeck, the arbitrator did much greater harm, returning a known and chronic sexual harasser to the workplace. The arbitrator's refusal to consider the additional evidence of sexual harassment, even

in determining the appropriate sanction, is a striking example of violating public policy under the guise of contractual interpretation. The perpetuation of the license given by the Seventh Circuit to an arbitrator to ignore relevant evidence in the public policy inquiry will effectively condone also the continuation of the hostile workplace environment so abhorred by this Court in *Meritor*.

Published studies amply document that what occurred in this case—the reinstatement of a sexual harasser (by a male arbitrator) after a woman made a complaint—is just what women fear, and what leads them not to report sexual harassment in the first place. A United States Merit Systems Protection Board study reported that 85% of all female harassment victims studied did not report sexually offensive behavior on the job to supervisors or other officials. *MSPB Study*, *supra* at 24, fig. 3-1. Many of these women failed to report the harassment because of embarrassment, fear of worsening harassment, and fear that their complaint would be held against them. *Id.* at 28, fig. 3-5. The Florida Gender Bias Study reports that 40% of female attorneys felt they had been sexually harassed at some time by a state-court judge, but only one of them had ever filed a complaint. *Report of the Florida Supreme Court Gender Bias Study Commission*, p. 206 (1990). In *Robinson*, *supra*, the court found, based on the testimony of expert witnesses, that of the five categorized methods women used to cope with sexual harassment in the workplace, formal complaint is the most rarely used because

> the victim of harassment fears an escalation of the problem, retaliation from the harasser, and embarrassment in the process of reporting. *Victims also often fear that nothing will be done* and they will be blamed for the incident. Thus, the absence of reporting of sexual harassment incidents cannot be viewed as an absence of such incidents from the workplace.

760 F.Supp. at 1506 (emphasis added). By permitting Gallenbeck to return to work until the number of reported instances reaches some yet-to-be-determined threshold, the arbitrator effectively allows chronic harassers like Gallenbeck to benefit from the documented tendency of vulnerable women to not report instances of sexual harassment.

The victim of Gallenbeck's harassment, having finally reached her limit and reported an incident, eventually disclosed additional incidents and was supported by other victims of Gallenbeck's sexual harassment in their reports. This salutary result has been undermined by the Seventh Circuit's affirmance of the arbitrator's award. By returning Gallenbeck to the workplace, the women employees' fears of escalation of the harassment, retaliation from the harassment, and further embarrassment were certainly revived and most probably realized.

III.

THE DENIAL OF A FEDERAL COURT FORUM FOR WOMEN TO CHALLENGE EMPLOYMENT DISCRIMINATION RESULTING FROM ARBITRAL REINSTATEMENT OF A SEXUAL HARASSER VIOLATES PUBLIC POLICY.

Also inherent in this case is a violation of a different type of public policy: that against allowing employment discrimination, including sexual harassment, to stand unchallenged.

In this case, the arbitrator substituted his own opinion for the employer's about what level of discipline is appropriate for a proven sexual harasser. Although arbitrators regularly assess and alter discipline levels, in this case such substitution is contrary to public policy. The arbitrator's interference creates a problem of employment discrimination—sexual harassment and the return of the sexual harasser to the workplace—but leaves the victim

of the discrimination with no federal court forum in which to assert her right to freedom from workplace harassment. Where an employer takes prompt, effective action to remedy sexual harassment—as Chrysler did here—no charge of discrimination is likely to be filed. If an arbitrator's award reinstating the sexual harasser is subsequently upheld, the victim of discrimination may then be left without any remedy. The arbitrator cannot be sued under Title VII for the reinstatement and the resulting renewed hostile work environment; the employer will raise its prompt action in dismissing the harasser as a defense to any Title VII suit; and in any event, the statute of limitations for filing a Title VII action will by that time almost certainly have expired. The very real stress and decrease in psychological well-being and employment opportunity suffered by the victims of sexual harassment would thus not be remediable under Title VII. A real wrong would exist against which there is plentiful public policy, but no remedy.

CONCLUSION

We respectfully request that this Court grant Chrysler's petition for writ of certiorari.

Respectfully submitted,

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REPLY BRIEF FOR PETITIONER

The Seventh Circuit in this case enforced an arbitration award that ordered Chrysler to return to its workforce a man who sexually assaulted a co-worker by reaching around from behind her and grabbing her breasts – and who had a history of sexually harassing female employees. In our certiorari petition, we showed – and respondents do not refute – that the court of appeals' decision adds to the enormous confusion surrounding the public policy doctrine, threatens efforts to end workplace sexual harassment, and creates intolerable uncertainties for employers trying to fulfil their Title VII obligations to provide a workplace free of sexual harassment.

Our petition demonstrated that the courts of appeals are divided over whether an arbitrator's award requiring reinstatement of a repeat sexual harasser violates public policy; since we prepared our petition, that division has become still deeper. In *Stroehmann Bakeries, Inc.* v. *Local 776, International Bhd. of Teamsters*, No. 91-5261, 1992 WL 150962 (June 29, 1992), the Third Circuit, over a dissent, refused to enforce an arbitrator's award reinstating a sexual harasser. Our petition showed as well how the Seventh Circuit ignored the command of *Paperworkers* v. *Misco, Inc.*, 484 U.S. 29 (1987), by declining to take account in its public policy inquiry of the established fact that the discharged employee had engaged in multiple acts of sexual harassment. In addition, the courts below aligned themselves with the minority of circuits that refuse to enforce an arbitration award on public policy grounds only when the award itself violates the law or requires the employer to do so. The two *amicus* briefs filed in support of our petition by the Florida Association

for Women Lawyers, the NOW Legal Defense and Education Fund, the Center for Women Policy Studies, the Center for Constitutional Rights, and the Equal Employment Advisory Council further attest to the need for this Court's intervention to bring an end to this confusion and to the severe consequences for women and their employers if the decision below is permitted to stand.

Respondents' brief in opposition simply fails to come to grips with our petition. It mischaracterizes our arguments about what the public policy against sexual harassment requires of employers; it misreads *Misco* and many of the courts of appeals' decisions that we cited; and it misunderstands the import of the decision below. Most conspicuously, respondents have no answer to our complaint that the Seventh Circuit's ruling is a serious obstacle to employers seeking to comply with Title VII and creates new risks of Title VII liability for compensatory and punitive damages. Nor do they offer any response to our conclusion that the decision below guts the public policy doctrine and effectively makes arbitration decisions unreviewable. For the reasons stated in our petition, and in the *amicus* briefs filed in support of the petition, this Court should grant the petition and address the important and troublesome issues raised by the court of appeals' decision.

I. As a preliminary matter, we must briefly address respondents' conclusory assertion that this case is moot (Br. in Opp. 3 n.2), and its veiled suggestion that it would somehow be imprudent for the Court to decide the questions we have presented because the Union has appealed the district court's denial of its contempt motion. *Id.* at 2-3. Both claims are specious. As we explained in our

petition (at 9 n.3), Chrysler's reinstatement and immediate firing of Mr. Gallenbeck does not moot any of the questions presented because the arbitrator's reinstatement award requires the company to make Mr. Gallenbeck whole for all lost pay and benefits for the period between the two occasions on which he was fired, except for the 30-day suspension held proper by the arbitrator. (Pet. App. 62a). It is the reinstatement award that has this consequence, and it is the reinstatement award that Chrysler challenges.

The Union's appeal of the denial of its contempt motion is wholly irrelevant to the issues we ask this Court to review. The district court held that Chrysler's firing of Mr. Gallenbeck immediately after his reinstatement – because of repeated acts of sexual harassment uncovered during preparation for the arbitration hearing – "was not addressed in the original arbitration award" (Pet. App. 63a) and so could not be in contempt of the court's order enforcing that award. That decision is clearly correct. See, *e.g.*, *Chicago Newspaper Guild* v. *Field Enterprises, Inc.*, 747 F.2d 1153, 1156 (7th Cir. 1984) (reinstated employee is "in the same position as any other employee * * * and would be subject to any lawful * * * discharge. Any future employment decisions affecting [the reinstated employee] would, of course, be evaluated independently"). More important, the Union's contempt action is a collateral proceeding that raises no question at all about the Seventh Circuit judgment of which we seek review, which establishes the law of the case.

II. Respondents contend that public policy does not prevent the enforcement of an arbitral award reinstating an employee found to have engaged in egregious sexual assaults and harassment, and that the lower courts

are uniform in recognizing this. They are seriously mistaken on both counts.

(a) The Union concedes (Br. in Opp. 8) that Congress and the courts have articulated a strong public policy against workplace sexual harassment. It also acknowledges (*ibid.*) that a key element of that public policy is Title VII's requirement that an employer "take all steps necessary to prevent sexual harassment," including *"developing appropriate sanctions."* 29 C.F.R. § 1604.11(f) (emphasis added). An employer that fails to take "immediate and appropriate corrective action" in response to sexual harassment (*id.*, § 1604.11(d)) risks liability for damages, including punitive damages, under Title VII. See Pet. 18.

The Union suggests that an employer might protect its women workers from sexual assaults of the sort that occurred here by "posting * * * notices on bulletin boards." Br. in Opp. 8. But it is the employer that is charged by Title VII with the duty to eliminate sexual harassment from the workplace, and the employer must "develo[p] appropriate sanctions" to this end. The arbitrator's award in this case flatly confounds Chrysler's determination of the action necessary to fulfil the company's Title VII obligations. Chrysler's discharge of Mr. Gallenbeck signaled its workforce that sexual harassment would not be tolerated; the arbitrator's decision sent just the opposite signal and relegated egregious sexual assaults to the category of "less serious" offenses. A clearer violation of Title VII's policy than the arbitrator's reinstatement of Mr. Gallenbeck – by that time known to be a persistent sexual harasser – is hard to imagine. A judgment more at odds with the national policy to end the sexual denigration of women in the workplace would

be hard to find. See Pet. App. 51a (sexual assault a "[l]ess serious infractio[n]" than "extremely serious offenses, such as stealing or striking a foreman").

Respondents nowhere advert to the arbitrator's finding that sexual harassment is a "[l]ess serious infractio[n]" than "stealing or striking a foreman." That finding makes a mockery of respondents' assertion (Br. in Opp. 4) that the arbitrator's just cause determination took proper account of the public policy against sexual harassment.

(b) Our view that the arbitrator's reinstatement award violated public policy has received further support since we prepared our petition. In *Stroehmann Bakeries*, a Third Circuit majority held that "[i]n addition to the public policy against sexual harassment in the workplace," there is "a well-defined, dominant public policy favoring *voluntary employer prevention* and *application of sanctions*" against workplace sexual harassment. 1992 WL 150962, at *6 (emphasis added). The employer's discharge of an employee whom it determined had sexually harassed a customer "observed and advanced this public policy." *Ibid.*

In *Stroehmann*, the arbitrator questioned whether the employer had established that the alleged sexual assault in fact took place, and ordered the employee reinstated. The court of appeals held that this award violated public policy because it allowed "a person who *may have* committed sexual harassment to continue in the workplace," though a determination that the assault did not occur had not been made. 1992 WL 150962, at *6 (emphasis added). Reinstatement of a suspected sexual harasser "does not discourage sexual harassment," the majority held, but "undermines the employer's ability to fulfill its obligation to prevent * * * sexual harassment." *Ibid.* Clearly,

then, had sexual harassment been proved, as it was in this case, the Third Circuit majority would not have countenanced reinstatement of the offender. Cf. Br. in Opp. 12-13. Indeed, Judge Becker, in dissent, explicitly noted the conflict between the majority's decision and both the Seventh Circuit's ruling here and the Tenth Circuit's ruling in *Communication Workers* v. *Southeastern Elec. Coop.*, 882 F.2d 467 (1989) (discussed at Pet. 20-21).[1]

(c) Respondents' efforts (Br. in Opp. 10-12) to explain away the conflict between the decision below and *Newsday, Inc.* v. *Long Island Typographical Union*, 915 F.2d 840 (2d Cir. 1990), are no more availing. To be sure, the employee reinstated in *Newsday* had previously been disciplined for sexual harassment, but that is not a ground for distinguishing between these two diametrically opposed cases. The arbitrator's decision in *Newsday* that discharge was not an appropriate punishment under the company's practice of "progressive discipline" necessarily depended on the belief that the employee was amenable to rehabilitation if disciplined and warned. 915 F.2d at 843. That factual determination is also precisely the one made by the arbitrator in this case. Thus, as to the facts relevant to the arbitrators' rulings – as well as to the questions for the courts of appeals' decisions (see Pet. 19-20) – *Newsday* and the present case are on all fours.

(d) *Newsday*, *Stroehmann*, *Communication Workers*, and the decision below show that the courts of appeals are in disarray as to the proper application of the public

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[1] We understand that a petition for certiorari will be filed in *Stroehmann*. This Court may wish to consider *Stroehmann* and this case together.

policy doctrine in cases in which an arbitrator has reinstated a sexual harasser. Respondents' claims to the contrary notwithstanding, *Misco* has obviously proved an insufficient guide to decision in such cases. *Misco* is manifestly not a "carbon copy" of this case, as the Union asserts. Br. in Opp. 6. The Court in *Misco* held that the "public policy" identified by the lower court had *not* been "ascertained 'by reference to the laws and legal precedents [rather than] from general considerations of supposed public interests.' " 484 U.S. at 44, quoting *Muschany v. United States*, 324 U.S. 49, 66 (1945). *Misco* thus provides little practical guidance in cases where an unmistakable and well-developed public policy is in issue – particularly one like the policy against workplace sexual harassment, which derives from a statutory scheme that places substantial duties upon employers to implement the policy.

It is also palpably erroneous for respondents to claim (Br. in Opp. 9-10) that *Misco* makes it "clear" that a court may not upset a reinstatement award on public policy grounds if the arbitrator found that the employee might be rehabilitated. The only language respondents cite for this proposition says that if an arbitrator found that an employee possessed drugs on plant premises but had not used and could be trusted in future not to use drugs at work, a court could not upset a reinstatement award because of its own views that plant safety was threatened. 484 U.S. at 45. What this Court did *not* say in *Misco* is that a reinstatement award would pass muster if the arbitrator had found that the worker had used drugs while on the job. That situation would be most comparable to the one in issue here, where the sexual assault took place at work. *Misco* says nothing about that situation.

III. Respondents apparently agree with us that, under *Misco*, a court called upon to decide whether an arbitrator's award violates public policy should consider established facts that were not taken into account by the arbitrator. Br. in Opp. 13-14 n.6. Respondents assert, however, that the court below applied this rule (see Pet. App. 8a-9a n.4) and ignored Mr. Gallenbeck's history of sexual harassment only because the arbitrator had not "established" that history as a fact by finding that other incidents of sexual harassment testified to at the hearing had occurred. *Ibid.* If we accept respondents' strained interpretation, the Seventh Circuit adopted an absurdly circular definition of what "established facts" a reviewing court may consider, one so demonstrably at odds with *Misco* as to require correction by this Court.

This Court stated in *Misco* that "[i]n pursuing its public policy inquiry, the Court of Appeals quite properly considered the established fact that traces of marijuana had been found in [the discharged employee's] car." 484 U.S. at 44. But that "established fact" had never been found by the arbitrator. On the contrary, the arbitrator had refused even "to accept into evidence the fact that marijuana had been found in [the employee's] car," because the employer had not been aware of that fact when it discharged the employee. *Id.* at 34. *Misco* therefore shows that for purposes of the public policy inquiry, facts may be established other than by an arbitrator's formal factfinding.

Indeed, any other view would insulate arbitrators' decisions from meaningful review on public policy grounds. An arbitrator who declined to admit evidence of facts or who declined to make a finding based on that evidence would thereby make it impossible for a court to

consider those facts even if they were highly pertinent to the issue whether an award violates public policy. Moreover, respondents do not even attempt to refute our argument (Pet. 23-26) that it makes no sense to insist that an arbitrator's decision about what evidence is relevant to one inquiry – whether there was just cause for discharge – should govern the facts that a court may consider when conducting the legally distinct inquiry whether the arbitrator's award violates public policy.

Just as this Court held in *Misco* that the arbitrator's refusal to find that the discharged employee had possessed drugs on company premises did not prevent the court of appeals from considering that fact in its public policy analysis, so here the Seventh Circuit should have considered Mr. Gallenbeck's admitted history of having "ass grabbed" female co-workers on four occasions (Chrysler Arb. Br. at 12), even though the arbitrator did not formally find that as a fact because he refused to consider that undisputed evidence. Any other approach would turn public policy review into an empty exercise.

IV. The district court – obviously (and with good reason) believing it was applying the law of the Seventh Circuit – explicitly held that no public policy barred Mr. Gallenbeck's reinstatement because "[n]o statute or judicial opinion * * * makes it *illegal* to employ a person who has sexually assaulted or harassed a co-worker on one occasion." Pet. App. 37a (emphasis added). The court of appeals never questioned that rationale, which also represents the position taken by the District of Columbia Circuit. See *American Postal Workers Union* v. *United States Postal Service*, 789 F.2d 1, 8 (D.C. Cir. 1986). See also *E.I. du Pont de Nemours* v. *Grasselli Emp. Ass'n*, 790 F.2d 611, 620 (7th Cir. 1986) (Easterbrook, J. concurring). In these

two circuits, therefore, the courts have answered in the affirmative the question left open in *Misco*, 484 U.S. at 45 n.12, whether a court may refuse to enforce an award only when it violated the law or required the employer to do so.

We showed in our petition (at 28) that the law in other circuits does not require that an arbitrator's award be illegal, only that, in all the circumstances, it be contrary to public policy. In *Newsday* and *Delta Air Lines* v. *Air Line Pilots Ass'n*, 861 F.2d 665 (11th Cir. 1988), the courts refused to enforce reinstatement awards, though the awards were not illegal and required no illegal conduct of the employer. The conflict among the circuits on this issue is undeniable and should be resolved by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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